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73-336

UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss.  
Second District )

At a session of the Appellate Court, begun and held  
at Elgin, on the 3rd day of December, in the year of our  
Lord one thousand nine hundred and seventy-three, within and  
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice  
Honorable GLENN K. SEIDENFELD, Justice  
Honorable WILLIAM L. GUILD, Justice  
LOREN J. STROTZ , Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On  
October 10, 1974 the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:





# 73-336

IN THE  
APPELLATE COURT OF THE STATE OF ILLINOIS  
SECOND JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
v. ) Appeal from the Circuit Court  
 ) for the 19th Judicial Circuit,  
MARK E. BOLE, ) McHenry County, Illinois  
 )  
Defendant-Appellant. )

MR. JUSTICE GUILD delivered the opinion of the court:

The sole question presented in this case is whether the waiver of a jury trial is knowingly and understandingly made where such waiver is made by counsel for the defendant in open court and in the presence of the defendant.

The defendant appeared before Judge Kelly on July 3, 1973 charged with violation of probation. It was disclosed that he had been charged with other offenses and in discussing those offenses, defendant's counsel, in the presence of the defendant, stated that "We will waive jury on those charges and then ask that all three matters be disposed of at the same time". The judge observed that he had previously offered to recuse himself, but defense counsel stated that he wished the judge to hear the matter. The hearing was then held on defendant's violation of probation and the trial court imposed a one year sentence of periodic imprisonment. The trial judge himself then computed the time of incarceration and probation time served by the defendant and found that defendant might be eligible for immediate release. The judge then inquired as to the other two charges pending against the defendant. At this point, again in the presence of the defendant, the trial judge asked, "And he waives trial by jury?" Defense counsel replied in the affirmative and the court further determined that the defendant



had in fact executed a written waiver of jury trial. The court then set the instant case for hearing for a date two weeks later. The charge of escape was then heard on July 17, 1973.

This court is cognizant of the cases of People v. Baker, 126 Ill.App.2d 1, 262 N.E.2d 7; People v. Boyd, 5 Ill.App.3d 980, 284 N.E.2d 699 and People v. Murrell, \_\_\_ Ill.App.3d \_\_\_, 314 N.E.2d 467, and do not find them to be in point as applied to the factual situation in this case.

Nor do we find the cases relied upon by defendant to be in point. In People v. Rambo (1970), 123 Ill.App.2d 299, 260 N.E.2d 119 the court at no time determined whether the defendant in fact waived a jury trial. As the court stated:

"Neither the defendant nor his counsel said that a jury trial was to be waived. The absence of an inquiry by the court and a response by the defendant or his counsel leaves the record barren of an express oral waiver."

In People v. Gaston (1971), 132 Ill.App.2d 900, 270 N.E.2d 846, we held that a signed jury waiver without affirmative showing that the defendant wished to waive a jury was not sufficient compliance with the rule requiring an express waiver of a jury trial in open court.

The case of People v. Sailor (1969), 43 Ill.2d 256, 253 N.E.2d 397 is dispositive of the issue presented in this case. In the case before us the trial court expressly inquired whether or not the defendant waived a trial by jury, counsel for the defendant stated that he did. In Sailor the Supreme Court stated:

"The record reveals that defendant's counsel, in her presence and without objection on her part, expressly advised the court that the plea was 'not guilty' and that a jury was waived. An accused ordinarily speaks and acts through his attorney, who stands in the role of agent, and defendant, by permitting her attorney, in her presence and without objection, to waive her right to a jury trial is deemed to have acquiesced in, and to be bound by, his action. (See: People v. Novotny, 41 Ill.2d 401; People v. Melero, 99 Ill.App.2d 208; People v. King, 30 Ill.App.2d 264; Hensley v. United States (D.C. cir.), 281 F.2d 605; People ex rel. Derber v. Skaff, 22 Wis.2d 269, 125 N.W.2d 561.)"

As has been stated many times, the question of waiver of a jury must be determined from the facts presented in each case. (People v. Kaprelian (1972), 6 App.3d 1066, 1071.) We find that the facts in Sailor are identical to the situation in the case before us.



There is no claim by the defendant herein that he was harmed or prejudiced by the waiver of a jury. We, therefore, affirm the judgment and conviction of the trial court.

AFFIRMED.

MORAN, T.J., P.J.: SEIDENTFELD, J. CONCUR



73-145

UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss.  
Second District )

At a session of the Appellate Court, begun and held  
at Elgin, on the 3rd day of December, in the year of our  
Lord one thousand nine hundred and seventy-three, within and  
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice  
Honorable GLENN K. SEIDENFELD, Justice  
Honorable L. L. RECHENMACHER, Justice  
LOREN J. STROTZ , Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

OCT 21 1974 the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:





FILED

OCT 21 1974

No. 73-145

LOREN J. STROTZ, Clerk pro tem  
Appellate Court, 2nd District

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
 )  
v. ) Appeal from the Circuit  
 ) Court of the Fifteenth  
 ) Judicial Circuit,  
GLORIA LOVE, ) Stephenson County,  
 ) Illinois.  
Defendant-Appellant. )

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant was convicted of aggravated battery (Ill.Rev.Stat. 1971, ch. 38, par. 12-4(b)(1)) after a jury trial. She was sentenced to 1-3 years imprisonment. She appeals, contending that she was not proven guilty beyond a reasonable doubt and that prejudicial argument of the prosecutor prevented a fair trial.

The indictment arose from the stabbing of Willie Drew Griffin in a veteran's club bar on September 14, 1972. There were a number of patrons in the bar at the time of the incident who testified. In substance, they agreed that the victim, Willie Griffin, was at the bar standing between the defendant and Grace Addison prior to the incident; that they did not see any weapon; and that the victim either had been drinking very heavily or was drunk.

Roger Clark, a deputy sheriff, testified that when he went to the hospital the night of September 14th to investigate the stabbing, he asked Griffin who stabbed him and defendant replied that Gloria Love stabbed him.





Earl Thomas testified for the State. He was playing cards at a table eight or ten feet from the bar, heard a popping noise and when he looked around he saw Willie Griffin back away from the bar holding his stomach, fall on the pool table, and heard him say he was hurt. He said that he saw the defendant standing with her hands in her pockets at that time. He did not see the defendant come running out in front of Willie Griffin or stick something in his stomach.

Grace Addison testified that she heard the defendant tell Willie Griffin not to drink from her glass, after which Griffin picked up the glass, threw it on the bar and hollered that he was cut. She said that Griffin was standing between her and the defendant with his back to her, that Griffin fell toward the defendant then fell back and said he was stabbed. She did not see defendant do anything after Griffin said he was cut.

James Johnson testified that the defendant was talking to him when she turned and saw Griffin at the bar; that defendant walked over, told Griffin not to drink from her glass and snatched it from his hands. Johnson said he later heard the glass "turning over" and he saw the defendant sucking her finger and Griffin backing from the bar. He testified that defendant appeared to have blood on her finger. He walked over to Griffin and saw a small hole near his navel. He also saw defendant go into the bathroom at that time.

Charles Williams testified that while he was playing cards he heard a commotion at the bar and when he looked around he saw Griffin back away from the bar, bent over. He did not see the defendant do anything but lick some blood from her finger.

Griffin testified on direct-examination that he got off work at 10 to 5, arrived at the club about 6:30 and had half a pint of vodka, his first drink that day. He said the defendant accused



him of drinking from her glass and snatched it from his hand causing the glass to break; that he then bought another drink and as he approached the table where some men were playing cards, the defendant stepped out in front of him and stabbed him in the stomach with a knife. He said that he did not see a knife and that he never threatened the defendant. He said that when he asked the defendant to remove the knife, she said "I am going to kill you". On cross-examination he said he was four feet from the bar, facing a card table when he was injured.

The defense introduced a statement given by Griffin to the sheriff's deputies in the hospital. In the statement Griffin said that the defendant walked up to him, took a knife from her bra, called him an obscenity and stuck him in the stomach. He said that the knife was six inches long and had a wooden handle, like a French knife. Griffin then explained the discrepancies between his in-court testimony and the statement by saying that he was under medication and had just left intensive care when the statement was made.

In the defendant's case Sheldon Keyes was called as a witness for the defense. He said that Griffin did not go to work that day, that they drank together and later that evening went to the club. He said that while he and the defendant were dancing, defendant pulled away and asked Griffin to leave her drink alone; that they resumed dancing when defendant pulled away and went over to the bar again to ask Griffin to leave her drink alone but before they got there a bottle "or something" broke on the bar. He said he was watching the defendant and he did not see a knife in either the defendant's or Griffin's hands. He heard Griffin say he was cut, but said that defendant did not jump in front of Griffin as he walked away from the bar. The State introduced a previous conviction of a felony as impeachment of this witness.





The defendant testified substantially in conformance with Keyes' testimony. She said that before they reached the bar Griffin broke the glass at the bar. She then said she sat on a bar stool and Griffin propositioned her. She asked him to leave because he had so much alcohol on his breath. As she was seated at the bar she looked down and saw a knife in Griffin's hand with the blade pointing into her leg. She said she took her right hand and turned the blade so the knife would be pointing in his direction, cutting her thumb. When Griffin refused to leave she got ready to get off the bar stool to move and as she did so Griffin rocked and fell toward her and straightened back up. She said he then put his right hand, the one with the knife, in his pocket and his left hand on his stomach, walked past her and fell over the pool table. She said that she did not have a knife that evening, that she had stopped carrying one a year and a half earlier when she was involved in an offense concerning a knife. She said that she went to the rest room to run some water on her hand after the incident.

There was further testimony by an employee of the plant where Griffin worked that he did not work the day of the stabbing. Griffin, called as a rebuttal witness, testified that his previous testimony was a mistake and that he had spent the entire day with Keyes but that he was at the plant to pick up his check at the close of the day.

There was medical testimony that Griffin suffered from a stab wound to the stomach and it was the doctor's opinion that the wound was inflicted by a long narrow bladed knife, which entered from the right side of the body, below and upward. The knife was never found.

Defendant argues that based on these facts the State has failed to prove beyond a reasonable doubt either the existence of



the knife in defendant's hands, that she intentionally caused him harm or in fact that defendant was stabbed.

The offense of aggravated battery requires proof that a person committing a battery intentionally or knowingly causes great bodily harm, in this case by the charged use of a deadly weapon (Ill.Rev.Stat. 1971, ch. 38, par. 12-4(a),(b)(1)). Whether "great bodily harm" was sustained is primarily a question of fact for the jury. (People v. Barbour (1972), 5 Ill.App.3d 323, 326.) The elements of the crime may be proved by circumstantial evidence leading on the whole to a satisfactory conclusion and producing a reasonable certainty that the accused and no one else committed the crime. (People v. Hayes(1972), 4 Ill.App.3d 997, 999-1000.) Where there is evidence establishing the use of a deadly weapon there is no requirement that the weapon be introduced into evidence. (People v. Moore (1972), 7 Ill.App.3d 315, 318.) A defendant who elects to explain her presence at the scene of the crime while denying participation must tell a reasonable story or be judged by its improbabilities. (People v. Morehead (1970), 45 Ill.2d 326, 330, cert. den. 400 U.S. 945.) It is the function of the trier of facts to determine the credibility of the witnesses and its finding of guilty will be disturbed only when the evidence is so unsatisfactory as to leave a reasonable doubt as to defendant's guilt. (People v. Morehead, 45 Ill.2d 326, 329.) The testimony of a single witness if it is positive and the witness credible is sufficient to convict even though it is contradicted by the accused. People v. Guido (1962), 25 Ill.2d 204, 208-9.

Here the jury could consider the discrepancies that existed in Griffin's testimony as to exactly how and where the act occurred in the tavern, the inconsistencies in his description of the weapon and other discrepancies on less material facts; but





they could also consider the improbability of the defendant's explanation in view of the total circumstances in the record. The conclusion reached by the jury on the conflicting evidence that defendant was guilty beyond a reasonable doubt is justified by the record.

Defendant further claims that the following statement of the prosecuting attorney in closing argument was prejudicial:

"The fact is that you have circumstantial evidence that she had blood on her hand, so that she is a person that had close proximity to the victim, the victim was cut, and there's blood. Put the two together, and I'm quite sure that you'll be convinced that the cutting was done by Gloria Love, \*\*\* ".

Defendant contends that the statements of the prosecuting attorney amounted to his own individual opinion or belief of the defendant's guilt (citing People v. Hoffman (1948), 399 Ill. 57; People v. Hopkins (1970), 124 Ill.App.2d 415),. She argues that although the statements were not objected to we should consider them as plain error under Supreme Court Rule 615(a). (Ill.Rev.Stat. 1971, ch. 110A, par. 615(a).) We do not agree. It is proper for a prosecutor to argue or express his opinion that the accused is guilty where he states or it is apparent that such an opinion is based solely on the evidence. (People v. Williams (1962), 26 Ill. 2d 190, 193; People v. Prim (1972), 53 Ill.2d 62, 77.) We conclude that the statements came within this rule.

Defendant also claims that the prosecutor's statement in closing that:

"Further, I think's (sic) it's very unusual if you are an innocent person that you do not give some explanation of your conduct or your activity to an investigating officer."

also is an expression of the prosecuting attorney's belief that the defendant was guilty and additionally is an attempt to equate the failure to give a statement to the police with guilt in the



minds of the jury and it is therefore plain error. (Citing People v. Jones (1972), 4 Ill.App.3d 888.) Again, we cannot agree. In the cross-examination of the defendant, the State's Attorney asked without objection whether defendant had told anyone at the time of her arrest or given a statement as to what happened and she answered "Not to my knowledge".

Even where a proper objection has been made to the type of cross-examination here involved, although conflicting authorities are noted, it has been held that such cross-examination is not reversible error. (People v. Queen (1972), 8 Ill.App.3d 858, 860-863. Reversed on other grounds in People v. Queen (1974), 56 Ill.2d 560.) In Queen, the defendant testified in his own behalf making an exculpatory statement. The prosecutor then elicited testimony on cross-examination that defendant had not previously made such statement to the police and then commented on defendant's failure to make a statement in final argument. Under the circumstances of this case, however, we do not feel obliged to choose between the conflicting authorities. Even if the statement is considered error no objection was raised and on the whole record it is not of the nature that calls for the relaxation of the rule that an objection is waived by failing to object since it did not result in substantial prejudice. See People v. Nilsson (1970), 44 Ill.2d 244, 248.

For the reasons stated we affirm the judgment below.

Affirmed.

THOMAS J. MORAN, P.J. and RECHENMACHER, J. concur.





## UNITED STATES OF AMERICA

State of Illinois       )  
Appellate Court       )   ss.  
Second District       )

At a session of the Appellate Court, begun and held at Elgin, on the 3rd day of December, in the year of our Lord one thousand nine hundred and seventy-three, within and for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice  
          Honorable GLENN K. SEIDENFELD, Justice  
          Honorable L. L. RECHENMACHER, Justice  
                 LOREN J. STROTZ, Clerk  
                 JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On  
                 1974 the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:



FILED

OCT 21 1974

EDWARD J. STROITZ, Clerk pro tem  
Appellate Court, Third District

No. 73-70

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
 )  
v. ) Appeal from the Circuit  
 ) Court for the Nineteenth  
 ) Judicial Circuit, Lake  
JERRY LEE HARRIS, ) County, Illinois.  
 )  
Defendant-Appellant. )

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant was convicted of armed robbery in a second jury trial after a jury had failed to reach a verdict in the first trial. He was sentenced to 5-30 years in the penitentiary. The defendant appeals, contending that the identification testimony of the sole witness was unreliable, and that in the absence of other corroboration the supported alibi testimony raised a reasonable doubt of guilt. Alternatively, the defendant contends that his sentence should be reduced under the Unified Code of Corrections.

Thomas Rubel, the manager of the Buehler Brothers Supermarket in Waukegan, the scene of the armed robbery, testified as the only witness for the State. He said that on October 29, 1971, he locked the doors of the store about midnight after the shelves had been restocked. As he walked across the street to the lot in which his car was parked, he was approached by a black man, standing 10 feet away from him, who asked him if he had any

jumper cables. Rubel said that he recognized the man as the same person who two weeks earlier had stopped him at approximately the same place and had asked whether a certain person was an employee of the market. On the former occasion the man was 8 to 10 feet from Rubel and the conversation lasted only a few seconds. Rubel identified the defendant in court as the man he had seen on both occasions. He testified that while there were no street lights near the point of the meetings, there was a set of floodlights on the side of the supermarket and a set of floodlights on the parking lot across the street.

The witness testified that on the October 29th occasion, after he had responded that he did not have cables and after he had turned toward his car, the defendant said he had a gun and told him not to run. Rubel said he looked around and for 1 or 2 seconds at approximately 5 to 6 feet, he observed the defendant before being told to get into his own car. He entered his car from the driver's side, thereafter sliding over into the passenger seat. He said he observed the defendant momentarily when the defendant got into the driver's seat before the dome light went off when the car door was closed. He thereafter looked straight ahead until the man asked him to give him the keys to the store, and when he did, he observed him again for several seconds.

Rubel said he observed an older man approach the car a short time later, who subsequently got into the back seat behind Rubel and placed a wire loop around Rubel's neck. As he did this, the defendant left the car and crossed the street and Rubel saw only his back as he entered the store. Approximately 3 to 5 minutes later the door on the driver's side opened, the dome light went on and he observed the defendant crouched down beside the car. Obeying the defendant's order, Rubel entered the rear of the store with the two men and at that time he saw only the back of the defendant.



Rubel testified that in the back room of the store he again saw the defendant's face but in very poor light. The three men proceeded to walk into the rear of the main room of the store and to the office. There was a night light and two ninety-six inch fluorescent lights on in the rear and two ninety-six inch fluorescent lights in the front. The lights in the front were located over the office directly above the safe. Rubel said it was in the office, during the actual robbery, that he made his final observations of the defendant. He observed the defendant's face as he told him to open the safe; he further observed the profile of the defendant's face as the defendant moved away from the safe; and his final view came when he was directed to answer his wife's phone call. Rubel was then bound and the men left.

On cross-examination Rubel stood by his positive identification of the defendant but admitted he told an investigating officer on the night in question that he did not get a good look at either person, that he was looking at the ground most of the time and that he told both the offenders that he did not want to be able to make an identification of them because he feared for his life. He said that the man who had the wire around his neck at one time said, "I ought to kill you, nigger," and that most of the time he was looking down at the ground or away from the two men. He also stated on cross-examination that he told the police that there was nothing unusual about the younger of the two men, describing him as a muscular black male about 25 years of age, weighing approximately 170 to 180 pounds, standing about 5'9" tall and wearing a furry Russian-type hat. However, he had difficulty describing the clothing worn by the younger man. He admitted that he went to the police station the night of the robbery and after looking at several photographs indicated to the police that one person whose picture he had viewed had characteristics similar to

the felon and that this person might be the robber. It was brought out that the picture was not that of the defendant.

One of the police officers testified for the defense that he was on duty when the defendant was brought in and that the defendant told him that he weighed 137 pounds. Although the witness did not weigh the defendant, he said that the figure given seemed approximately correct to him.

The defendant's employer, who ran a pool hall in Gary, Indiana, accounted for the defendant's time until approximately 11:30 P.M. on October 29th. On cross-examination, however, he was unable to remember either the time or with whom the defendant left from work on several other occasions.

The defendant testified in his own behalf that he left the pool hall in Gary at 11:10 P.M. with his brother and two other men and was drinking in Gary until 3:00 A.M. He stated he had never been in Lake County. He admitted to having lied to one of the police officers about his residence and place of employment when he was booked for the crime in question, but he explained that he lied to protect his probation, earned after having served two years and six months of a 1 to 10 year sentence for burglary.

It has been firmly established that identification by a single witness to a crime is sufficient to sustain conviction even though the testimony of the witness is contradicted by the accused, providing the witness is credible and the view of the accused is under circumstances which permit a positive identification. E.g., People v. Stringer (1972), 52 Ill.2d 564, 569; People v. McVet (1972), 7 Ill.App.3d 381, 385.

The defendant argues that the testimony of the State's witness is not credible. He refers to Rubel's lack of memory as to some details of clothing, his inability to recall whether the defendant had a mustache or in which hand the gun was carried, a

difference in height and weight, and his admission on cross-examination that the witness did not have a good view because of his fear of looking directly at the armed robber. Discrepancies or omissions in descriptions do not necessarily effect the validity of the identification testimony. (See People v. Bennett (1973), 9 Ill.App.3d 1021, 1025; People v. Davis (1966), 70 Ill.App.2d 419, 422-3.) Under the circumstances here we cannot substitute our judgment for that of the jury in assessing the weight to be given the evidence or in determining the credibility of the witness. People v. Stringer, 52 Ill.2d 564, 568.

Despite the witness's understandable fear of looking directly at the armed robber, it is evident from the entire record of his testimony that he nevertheless was thrust into a number of face to face confrontations with the defendant at close distances under adequate lighting conditions. The description was adequate and the in-court identification, moreover, was positive. We will not reverse a criminal conviction unless the evidence is so improbable as to raise a reasonable doubt of guilt. (People v. Stringer, 52 Ill.2d 564, 568; People v. Catlett (1971), 48 Ill.2d 56, 64.) On the whole record before us we do not reach the conclusion that there is a reasonable doubt of guilt, and therefore we affirm the conviction.

The defendant also argues that this sentence which included the minimum for armed robbery when imposed (Ill.Rev.Stat. 1971, ch. 38, par. 18-2) should be reduced to the minimum of 4 years now provided under the Unified Code of Corrections (Ill.Rev.Stat. 1973, ch. 38, par. 1005-8-1). Either minimum sentence would be within permissible limits under the Unified Code but we are unable to determine clearly from the record that the trial court had intended

to impose the lowest possible minimum sentence. We therefore remand the cause to the trial court for resentencing pursuant to the Unified Code of Corrections.

Judgment affirmed, cause remanded for resentencing.

THOMAS J. MORAN, P.J. and RECHENMACHER, J. concur.

## UNITED STATES OF AMERICA

State of Illinois       )  
Appellate Court       )   ss.  
Second District       )

At a session of the Appellate Court, begun and held  
at Elgin, on the 3rd day of December, in the year of our  
Lord one thousand nine hundred and seventy-three, within and  
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice  
          Honorable WILLIAM L. GUILD, Justice  
          Honorable L. L. RECHENMACHER, Justice  
                 LOREN J. STROTZ , Clerk  
                 JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

OCT 22 1974       the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:





OCT 22 1974

LOREN J. STOLTZ, Clerk pro tem  
Appellate Court, 2nd District

Appeal from the  
Circuit Court for  
the 19th Judicial  
Circuit, Lake  
County, Illinois

Defendant bases his argument on the one-third rule. This rule, established by the ABA standards and incorporated in the Unified Code of Corrections for class 2 and class 3 felonies, requires that the minimum sentence shall not exceed one-third the maximum sentence actually imposed. Defendant concedes, and this court has held, that the ABA standards are suggestions and not the law. (People v. Johnson, 6 Ill. App. 3d 1083, 1085 (1972).)



The defendant maintains, however, that any "radical variance" from the one-third rule renders the sentence determinate as a matter of law. He sets forth no criterion for his conclusion that the four year spread in the instant case constitutes a "radical variance". Sentences with only one year between the minimum and maximum have been held indeterminate. (People v. Bell, 7 Ill. App. 3d 625, 627-28 (1972); People v. Weaver, 5 Ill. App. 3d 754, 757-58 (1972).) Even a one day variance, there requested by the defendant, has been held to be indeterminate. People v. Catlett, \_\_\_\_\_ Ill. App. 3d \_\_\_\_\_, 314 N.E. 2d 346, 349 (1974).

The defendant contends that the sentence imposed violates the constitutional directive that sentences "shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."

The trial judge was cognizant of the seriousness of the actual offense and of the brutal and violent manner in which it was committed by defendant. The trial judge was also aware that defendant had been convicted and sentenced for a prior felony and that the probation report and the testimony of the psychologist during the hearing on aggravation and mitigation both indicated that the defendant lacked self-discipline and was in need of institutional care. Under these circumstances, it is clear that the trial judge imposed sentence with the objectives of restoring the offender to useful citizenship and protecting society at large. People v. Harston, Gen. No. 72-328, \_\_\_\_\_ Ill. App. 3d \_\_\_\_\_ (1974).

The judgment of the trial court is affirmed.

Judgment affirmed

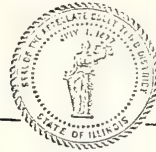
GUILD and RECHENMACHER, J.J. - concur



74-12

People vs. Milton J. Barren

STATE OF ILLINOIS



APPELLATE COURT      THIRD DISTRICT  
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,  
on the 1st Day of January in the Year of our Lord one thousand  
nine hundred and seventy-four, within and for the Third District  
of Illinois:

Present—

HONORABLE ALBERT SCOTT, Presiding Justice

HONORABLE ALLAN L. STODER, Justice

HONORABLE JAY J. ALLOY, Justice

HONORABLE WALTER DIXON, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on  
October 24, 1974 the Opinion of the  
Court was filed in the Clerk's Office of said Court, in the words  
and figures following, viz:





In The  
APPELLATE COURT OF ILLINOIS  
Third District  
A. D. 1974.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Kankakee County
	)	
vs.	)	
	)	
MILTON J. BARREN,	)	
	)	
Defendant-Appellant.	)	

PER CURIAM

Abstract

This is an appeal from a judgment of the Circuit Court of Kankakee County which found defendant guilty, after a bench trial, of the offense of burglary and pursuant to which defendant was sentenced to a term of not less than 3 nor more than 12 years in the Illinois State Penitentiary. The office of the State Appellate Defender was appointed to represent defendant in the appeal in this Court. Such Appellate Defender has now moved for leave to withdraw as counsel on appeal in accordance with the precedent in Anders v. California, 386 U.S. 738. The Appellate Defender asserts, after a careful examination of the record, that the conclusion must be reached that an appeal would be wholly frivolous and without possibility of success. The motion for leave to withdraw was accompanied by a brief in support of counsel's conclusion.

The record indicates that defendant Milton Barren was indicted for burglary. The indictment clearly set forth the nature and elements of the offense and complied with other requisites of the Illinois Revised Statutes, 1973, Chapter 38, §111-3. Barren pleaded not guilty at arraignment and was released on bond. Following a subsequent waiver of jury trial, defendant agreed to a bench trial after being fully advised of his rights by the court.



At the trial, Michael Toma testified that he was coming home from high school at about 2:00 P.M. on May 29, 1973, when he saw a 1963 green Chevrolet blocking his driveway. He removed the keys from the ignition, laid them near a bush, and proceeded into the house and watched from an upstairs bedroom. He saw a man get out of a black Chrysler carrying a gas can and placing the gas into the Chevrolet before starting it and driving up to the house. After the man knocked at the door, Toma heard a window break and thereafter heard sounds of furniture being moved around in the downstairs living room. He then heard the car begin to leave and looked out the window and saw the Chevrolet departing with a television set located in the trunk of the car. He described the intruder as a Negro man wearing a brown hat, black leather jacket and green baggy pants. Toma made an in-court identification of the defendant as the man he observed.

A police officer also testified for the prosecution and stated that after investigating the burglary of the Toma residence, he saw a green Chevrolet parked along the road. After questioning the driver about the reason the car was parked on the roadside, he saw that there were no keys in the ignition. The ignition was the type that had a lock and start position and could be operated without a key. The officer had obtained the keys at the Toma residence and found that the keys did fit the ignition. The driver of the car who was being interrogated by the officer, wore green pants and a dark brown or black jacket. Defendant was the driver at the time Officer William Pettit questioned him. Another officer testified he investigated the case and that, in the course of his investigation, he discovered the Toma television set in Mary Baker's trailer.

The lone defense witness was Mary Baker who stated that on May 29, 1973, two unknown men delivered the television set at the trailer. Mary Baker's boyfriend was defendant Milton Barren.

It is apparent that the eye-witness identification corroborated by the car keys, defendant's clothes at the time of his arrest, and the fact that the Toma



television set was found in defendant's girl friend's trailer, supported the trial court's judgment that defendant was proven guilty beyond a reasonable doubt. At the hearing in aggravation and mitigation, a presentence report was submitted and defendant testified in his own behalf. The presentence report reflected that defendant was 48 years old with a long record of felony convictions and prior periods of incarceration. Defendant denied his guilt but, in the cross-examination, admitted two of the prior felony convictions and prior sentences. It is apparent that the sentencing hearing was adequate since defendant admitted a prior criminal history (People ex rel Hanrahan v. Wilson, 48 Ill. 2d 30, 268 N. E. 2d 23).

Defendant's request for probation was denied. The State recommended a maximum of 6 years 8 months to 20 years. The court, however, sentenced defendant to not less than 3 years nor more than 12 years, as we have indicated. The sentence imposed was within the statutory range for a Class 2 felony such as burglary. [Ill. Rev. Stat. 1973, ch. 38, §1005-8-1(b) & (c)]. The sentence was not excessive in view of defendant's prior felony record.

In view of the record in this cause, we concur in defense counsel's conclusion that there is no basis for maintaining an appeal in this cause and that a continuation of the appeal would be wholly frivolous and could not possibly succeed. The judgment of the Circuit Court of Kankakee County is, therefore, affirmed and the motion of the State Appellate Defender to withdraw as counsel for defendant, Milton J. Barren is allowed.

Judgment affirmed and  
withdrawal motion allowed.





No. 73-351 and  
No. 73-385

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

3D  
23 I.A. 104  
**FILED**  
OCT 17 1974  
*Walter J. Spomer*  
CLERK, DISTRICT OF ILLINOIS  
CLERK APPELLATE COURT

---

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court of
Plaintiff-Appellee,	)	Massac County.
vs.	)	
	)	
MICHAEL SCOTT,	)	Honorable Dorothy Spomer,
	)	Judge Presiding.
Defendant-Appellant	)	

---

Mr. PRESIDING JUSTICE G. MORAN delivered the opinion of the court:

Pursuant to a plea agreement, the defendant pled guilty to the crime of escape in violation of par. 31-6a of Chapter 38, Illinois Revised Statutes, and to the crime of theft of over \$150.00 in violation of paragraph 16-1a of Chapter 38, Illinois Revised Statutes and was sentenced to concurrent sentences of one to three years in prison and ordered to pay the court costs. As a result of his plea agreement, several other charges pending against the defendant were dismissed.

Defendant's sole contention on this appeal is that the imposition of court costs after a plea agreement which did not include costs was a broken promise which made the plea involuntary and which entitled the defendant to plead anew.

In our opinion this contention is so lacking in merit that it needs no discussion.

Judgment affirmed.

CONCUR:

Crebs, Carter, JJ.

PUBLISH ABSTRACT ONLY.



No. 73-113

FILED  
JAN 1 - 1974IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT*W.C. Zimmerman*  
FIFTH DISTRICT OF ILLINOIS  
CLERK APPELLATE COURT

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent-Appellee,

v.

JAMES HYDE,

Petitioner-Appellant.

Appeal from the Circuit Court of  
St. Clair CountyHonorable Robert L. Gagen  
Judge Presiding

Mr. JUSTICE CARTER delivered the opinion of the court:

The defendant appeals from the dismissal without an evidentiary hearing of his pro se post-conviction petition. On December 12, 1969, defendant was convicted of murder, armed robbery and unlawful restraint, and although the jury recommended the death penalty, the defendant was sentenced to 99 to 100 years. The conviction was appealed but affirmed by this court. People v. Hyde (1971), 1 Ill.App.3d 831.

We affirm the judgment of the trial court in dismissing defendant's post-conviction petition without an evidentiary hearing.

The defendant's post-conviction petition listed five grounds for relief:

- 1) improper arrest.
- 2) failure to be advised of his rights under the Miranda case and being held incommunicado for four days.
- 3) use of perjured testimony.
- 4) exclusion of jurors who opposed the death penalty.
- 5) being arraigned without the assistance of counsel.

The trial court allowed the prosecution's motion to dismiss because the issues raised in the post-conviction petition were res judicata, having been discussed in the opinion on direct appeal (People v. Hyde, supra.) or considered but not discussed. The trial court was correct in its ruling.

On this appeal, the defendant raised only one issue: lack of counsel at arraignment. Without a doubt, defendant did not have counsel at arraignment. The right to counsel at arraignment in Illinois is both



statutory (chapter 38, section 113-1 et seq) and constitutional (Hamilton v. Alabama (1961), 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114. Chapter 38, section 113-6 provides:

"Neither a failure to arraign nor an irregularity in the arraignment shall effect the validity of any proceeding in the cause if the defendant pleads to the charge or proceeds to trial without objecting to such failure or irregularity."

Defendant went to trial without objecting to the arraignment and was convicted by a jury. He did not raise the point in the post-trial motion or on direct appeal. Post-conviction relief is not available on issues raised on direct appeal or which could have been raised. (People v. Derengowski, 44 Ill.2d 476; People v. Somerville, 42 Ill.2d 1; People v. Cook, 11 Ill. App.3d 216). Defendant concedes this point but asks an appeal to find that "fundamental fairness" requires relaxation of the doctrine in this case. Most of the cases on fundamental fairness deal in some manner with abrogation of proper review on direct appeal through ineffective or incompetent counsel (People v. Somerville, supra; People v. Hamby, 32 Ill.2d 291). In the instant case, defendant filed an extensive pro se brief on his direct appeal, containing numerous issues and was aided by appointed counsel who even filed a petition for rehearing. Defendant was competently represented at trial and this court found no error (People v. Hyde, supra.) There is no reason to relax the res judicata doctrine on fundamental fairness grounds.

Defendant has cited no cases, and none have been found, holding that failure to have counsel present at arraignment where defendant pled "not guilty" is error per se without a showing of prejudice.

Judgment of the Circuit Court of St. Clair County is affirmed.

Judgment affirmed.

MORAN, P.J., AND CREBS, J., CONCUR.

PUBLISH ABSTRACT ONLY





IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

FILED  
SEP 11 1974FIFTH DISTRICT OF ILLINOIS  
CLERK APPELLATE COURT

THE PEOPLE OF THE STATE OF ILLINOIS, )

Plaintiff-Appellee, )

vs. )

LENDELL GERSBACHER, )

Defendant-Appellant. )

Appeal from the Circuit Court of Wayne  
County - Second Judicial Circuit.Honorable William G. Eovaldi,  
Judge Presiding.

Mr. PRESIDING JUSTICE G. MORAN delivered the opinion of the court:

This case involves a petition for post-conviction relief from a judgment of guilty entered on a plea of guilty to the offense of attempted murder. After an evidentiary hearing was held, the Circuit Court of Wayne County dismissed the petition for a failure to prove the allegations made by the defendant. Defendant appeals.

On October 13, 1969 the defendant, Lendell Gersbacher, was charged with the attempted murder of his stepson, John Hiatt. Since the defendant was indigent, a public defender was initially appointed to represent him. Pursuant to motions filed by the public defender and the state's attorney, the circuit court ordered that a competency examination be performed to determine the defendant's competency to stand trial and assist in the preparation of his defense. The examination was conducted by a psychologist and a neuropsychiatrist. As a result of the examination, the psychologist made a finding that:

"(T)here is no evidence of psychosis (insanity) or moderate to moderate - severe neurosis (nervousness) nor other personality or behavior defect that could offer impediment to more than reasonable competency to stand trial for the charges placed against him, much less, to assist in the preparation of his own defense."

Subsequently the public defender withdrew from the case because of illness and a second attorney was appointed to represent the defendant. After two conferences with the defendant, at which time the defendant expressed fears concerning adverse pre-trial publicity, his attorney made a motion for change of venue from the circuit court of Jefferson County to the circuit court of Wayne County which was subsequently granted. At another conference after the change of venue but before trial, the



defendant questioned the selection of Wayne County since the trial was to be held in Fairfield, Illinois, a community located only 30 miles from Mt. Vernon, the scene of the alleged offense. His attorney then made another motion for change of venue which was denied.

When brought to trial, his attorney told the defendant that he had been approached by the state's attorney with a plea bargain. The defendant stated that he was not interested and that he would like to speak with his parents before the trial began. A conference was then held between his attorney, the defendant and his parents at which time his attorney informed them that the possibilities of acquittal were very remote and that if the negotiated plea was not accepted, the state's attorney intended to ask for the maximum penalty. The defendant stated that he was still not interested in a negotiated plea.

When the trial began the judge asked whether or not a negotiated plea was agreed upon. The defendant's attorney replied that an attempt was made but that no conclusion had been reached. He then informed the judge that he thought negotiations should be attempted one last time. A recess was held and the defendant's attorney once again met with the state's attorney. Thereafter he informed the defendant that if he changed his plea from not guilty to guilty, the state's attorney would make a recommendation for a sentence of ten to fourteen years in the penitentiary to run concurrently with that of a prior conviction. The defendant was told that this would be substantially less than what he would receive if he went to trial and was found guilty. He then changed his plea of not guilty to guilty and was sentenced pursuant to the plea bargain agreement. This court affirmed the conviction on direct appeal in People v. Gersbacher, 4 Ill.App.3d 921, 282 N.E.2d 238 (1972).

Thereafter, the defendant filed a post-conviction petition pursuant to the provisions of the Illinois Post-Conviction Hearing Act (Ill. Rev. Stat. 1973, ch. 38, par. 122-1 et seq.), alleging that his plea of guilty was the result of coercion from adverse publicity and that he had been inadequately represented by appointed counsel who allegedly failed to pursue a competency examination as per order of the circuit court. An evidentiary hearing was held and the petition for post conviction relief was denied.

The defendant contends that his plea of guilty was the direct result of pre-trial publicity and that he was inadequately represented by counsel who failed to raise



a valid insanity defense.

The Illinois Post-Conviction Hearing Act was designed to provide a remedy whereby defendants who allege that they were imprisoned in violation of their constitutional rights may obtain a hearing to determine whether any such violations occurred at the time of their conviction. People v. Pier, 51 Ill.2d 96, 281 N.E.2d 289; People v. Orndoff, 39 Ill.2d 96, 233 N.E.2d 378. However, it is not within the purpose of the Act to have claims considered which could have been presented on direct review of the conviction. People v. Myers, 46 Ill.2d 270, 263 N.E.2d 113; People v. Armes, 37 Ill. 2d 457, 227 N.E.2d 745. And furthermore, in a post-conviction hearing the burden is on the petitioner to show that he was deprived of a substantial constitutional right. People v. Allison, 8 Ill.App.3d 161, 289 N.E.2d 195; People v. Hampton, 7 Ill.App.3d 1036, 288 N.E.2d 656.

As concerns the defendant's first argument that his plea of guilty was the direct result of coercion from pre-trial publicity, it is well settled that a voluntary guilty plea acts as a waiver of all non-jurisdictional issues. People v. Dunn, 52 Ill.2d 400, 288 N.E.2d 465; People v. Brown, 41 Ill.2d 503, 244 N.E.2d 159. Therefore, in order for the defendant to be entitled to post-conviction relief based upon this issue, it is necessary for him to show that his plea of guilty was rendered involuntarily as a result of adverse pre-trial publicity. This he has failed to do.

On direct appeal, the defendant alleged that the trial court failed to properly advise him of his rights prior to accepting his plea of guilty. There was no allegation made at that time that his plea of guilty was coerced because of adverse pre-trial publicity and we found that "the record affirmatively shows that the defendant's plea of guilty was made understandingly and voluntarily." People v. Gersbacher, 4 Ill.App.3d at 924.

At his post-conviction hearing, the defendant failed to produce any substantial evidence which would suggest that he pled guilty because he feared that he could not receive a fair trial in Wayne County. The defendant testified that after his attorney obtained a change of venue from Jefferson County to Wayne County, he was afraid that he still might be subjected to prejudicial publicity, but he did not testify that he pled guilty because he feared that he could not receive a fair trial in Wayne County. Nor did he testify that he would not have pled guilty if his second motion for change of





venue had been granted. The arguments presented in his brief and his testimony suggest that while he may have been reluctant to plead guilty, he did so after listening to advice of counsel that there was a strong case against him, that the possibilities of acquittal were very remote, and that he would most likely receive a more severe sentence if the case went to trial.

The defendant's mother testified that she was present when her son made the decision to plead guilty. Her testimony also indicates that the guilty plea was entered because of statements made by the attorney for the defendant. She did not testify that her son pled guilty because he feared pre-trial publicity had eliminated his right to a fair trial.

Defendant's attorney testified that the defendant's decision to accept the plea negotiations and enter a guilty plea was entirely voluntary. He gave no testimony supporting defendant's allegation that the guilty plea was the direct result of coercion from pre-trial publicity.

We therefore reiterate our holding on direct appeal that the defendant's guilty plea was entered voluntarily and conclude that it was not the direct result of pre-trial publicity.

The defendant argues that his counsel was incompetent because he failed to pursue a valid insanity defense. This contention is contradicted by the medical information contained in the record.

Judgment affirmed.

CONCUR:

Eberspacher, Crebs, JJ.

PUBLISH ABSTRACT ONLY.



No. 73-82

IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

FILED  
OCT 10 1969  
J. R. [unclear]  
Clerk of the Appellate Court  
Fifth District

IN THE MATTER OF THE APPLICATION OF  
THE COUNTY COLLECTOR FOR JUDGMENT  
AND ORDER OF SALE AGAINST LANDS AND  
LOTS RETURNED DELINQUENT FOR NON-  
PAYMENT OF GENERAL TAXES FOR YEAR  
1967 AND PRIOR YEARS.

Appeal from the Circuit Court  
of St. Clair County.

PETITION OF TAX PROPERTIES CORPORATION  
FOR A TAX SALE REFUND.

Honorable Quentin Spivey,  
Judge Presiding.

PER CURIAM:

This is an appeal from the denial of a motion to set aside judgment filed by the State's Attorney of St. Clair County. The Tax Properties Corporation filed a petition in the circuit court pursuant to chapter 120, section 741, Ill.Rev.Stat. to have a number of sales at the St. Clair County tax sale for 1967 delinquent taxes declared in error. A hearing was subsequently held. An additional petition was filed concerning other property. A summons was issued for service upon the County Clerk but there is no proof of service in the record and the County Clerk did not respond. No notice of the hearing was given to the St. Clair County Clerk. Although the record indicates that evidence was taken, the record contains no transcript of the proceedings. Two orders were entered by the court granting part of the relief requested by petitioner. Almost six months later, the Collector of Taxes for St. Clair County, through the State's Attorney, filed a motion to set aside judgment, apparently pursuant to chapter 110, section 72, Ill. Rev.Stat. The motion alleged in pertinent part:

1. That the sale for taxes for the year 1967 was held between February 17, 1969 and March 5, 1969, and that at that time Section 741, Chapter 120, of the Illinois Revised Statutes, was not effective until July 1, 1970.
2. That the Court lacked jurisdiction to enter said Order and that it was contrary to the section of the Revenue Code cited herein.

The significant change in section 741 allowed petition for refund



in the court which ordered the property sold. Prior to this time, petition could only be made to the County Clerk. The motion to set aside the judgment is clearly based on an allegation of lack of subject matter jurisdiction. The motion was heard and denied and the County appeals.

On appeal, the County asserts for the first and only time the lack of personal jurisdiction because no notice was given the County of the hearing on the original petition. The County does not challenge the lower court's finding of proper subject matter jurisdiction.

This case is disposed of by Motorola, Inc. v. Illinois Fair Employment Practices Commission, 34 Ill.2d 266 (1966). On appeal from a finding of unfair employment practices, Motorola asserted for the first time lack of notice of an administrative modification hearing. The Court said at page 272:

Motorola did not present any objection based upon defective notice to the circuit court and it may not raise this issue for the first time on appeal. (See Ray v. City of Chicago, 19 Ill.2d 593, 602). To the extent that such a defect might be regarded as jurisdictional, it would relate to jurisdiction of the person rather than of the subject matter, and a challenge of jurisdiction over the person is waived unless it is raised at the earliest opportunity. Cf. Traders Mutual Life Insurance Co. v. Humphrey, 207 Ill. 540.

The County's earliest opportunity to raise lack of personal jurisdiction through absent or defective notice was in its motion to set aside judgment. By failing to raise the question at that time, the County has waived any defect in jurisdiction.

Affirmed.

MORAN, G., PJ, Not Participating

PUBLISH ABSTRACT ONLY





No. 73-81

IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

IN THE MATTER OF THE APPLICATION OF  
THE COUNTY COLLECTOR FOR JUDGMENT  
AND ORDER OF SALE AGAINST LANDS AND  
LOTS RETURNED DELINQUENT FOR NON-  
PAYMENT OF GENERAL TAXES FOR YEAR  
1966 AND PRIOR YEARS.

PETITION OF TAX PROPERTIES CORPORATION  
FOR A TAX SALE REFUND.

Appeal from the Circuit  
Court of St. Clair County.

Honorable Quinten Spivey,  
Judge Presiding.

PER CURIAM:

This is an appeal from the denial of a motion to set aside judgment filed by the State's Attorney of St. Clair County. The Tax Properties Corporation filed a petition in the circuit court pursuant to chapter 120, section 741, Ill.Rev. Stat., to have a number of sales at the St. Clair County tax sale for 1966 delinquent taxes declared in error. A hearing was subsequently held. An additional petition was filed concerning other property. No notice of the hearings was given to the St. Clair County Clerk. Although the record indicates that evidence was taken, the record contains no transcript of the proceedings. Two orders were entered by the court granting part of the relief requested by petitioner. Almost six months later, the Collector of Taxes for St. Clair County, through the State's Attorney, filed a motion to set aside judgment, apparently pursuant to chapter 110, section 72, Ill.Rev.Stat. The motion alleged in pertinent part:

1. That the sale for taxes for the year 1966 was held between April 29, 1968 and May 14, 1968 and that at that time, Section 741, Chapter 120, of the Illinois Revised Statutes, was not effective until July 1, 1970.
2. That the Court lacked jurisdiction to enter said Order and that it was contrary to the section of the Revenue Code cited herein.

The significant change in section 741 allowed petition for refund in the court which ordered the property sold. Prior to this time,



petition could only be made to the County Clerk. The motion to set aside the judgment is clearly based on an allegation of lack of subject matter jurisdiction. The motion was heard and denied and the County appeals.

On appeal, the County asserts for the first and only time the lack of personal jurisdiction because no notice was given the County of the hearing on the original petition. The County does not challenge the lower court's finding of proper subject matter jurisdiction.

This case is disposed of by Motorola, Inc. v. Illinois Fair Employment Practices Commission, 34 Ill.2d 266 (1966). On appeal from a finding of unfair employment practices, Motorola asserted for the first time lack of notice of an administrative modification hearing. The Court said at page 272:

Motorola did not present any objection based upon defective notice to the circuit court and it may not raise this issue for the first time on appeal. (See Ray v. City of Chicago, 19 Ill. 2d 593, 602). To the extent that such a defect might be regarded as jurisdictional, it would relate to jurisdiction of the person rather than of the subject matter, and a challenge of jurisdiction over the person is waived unless it is raised at the earliest opportunity. Cf. Traders Mutual Life Insurance Co. v. Humphrey, 207 Ill. 540.

The County's earliest opportunity to raise lack of personal jurisdiction through absent or defective notice was in its motion to set aside judgment. By failing to raise the question at that time, the County has waived any defect in jurisdiction.

Affirmed.

MORAN, G., PJ, Not Participating

PUBLISH ABSTRACT ONLY



72-364

UNITED STATES OF AMERICA

State of Illinois     )  
Appellate Court     )   ss.  
Second District     )

At a session of the Appellate Court, begun and held at Elgin, on the 3rd day of December, in the year of our Lord one thousand nine hundred and seventy-three, within and for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice  
          Honorable WILLIAM L. GUILD, Justice  
          Honorable L. L. RECHENMACHER, Justice  
                  LOREN J. STROTZ     , Clerk  
                  JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit:   On

OCT 22 1974 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:





No. 72-364

FILED

OCT 22 1971

IN THE  
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Circuit Court of Appeals  
Second DistrictCOUNTY OF WINNEBAGO, a body  
Politie and Corporate,

Plaintiff-Appellee,

v.

DOYLE LAUNIUS and EVANNA LAUNIUS,

Defendant-Appellants.

Appeal from the  
Circuit Court of  
Winnebago County,  
Illinois

MR. PRESIDING JUSTICE THOMAS J. MORAN delivered the opinion of  
the court:

Defendants own and reside on a 5-acre tract, zoned for agricultural use, in Winnebago County. On April 8, 1971, they filed a petition for a conditional use permit seeking permission to place a trailer on their property. After a hearing, the zoning board of appeals denied the request on May 20, 1971. Between the time of filing the petition and its denial, defendants had moved the trailer onto their premises. On June 14, 1971, the Board of Supervisors concurred with the zoning board of appeals and denied the defendants' petition for a conditional use permit. No appeal was taken from this denial. The trailer remained on defendants' property and plaintiff filed suit seeking to enjoin defendants from using their land in violation of the zoning regulation.



A temporary injunction issued on September 30 directing defendants to cease any further installations for or to the trailer on the premises. Thereafter, defendants answered, admitting all allegations in plaintiff's complaint, including their violation of the ordinance, but claimed, by way of an affirmative defense, that the ordinance as applied to them was unconstitutional. At trial, they attempted to introduce evidence of personal hardship as a factor which might properly be considered in determining the ordinance to be invalid. Plaintiff's objection to the introduction of this evidence was sustained and the defendants made an offer of proof.

The offer consisted of defendants' testimony wherein it was established that Mrs. Launius' father was ill, that Mrs. Launius' parents could not provide for their basic needs and maintenance without defendants' assistance, and that the parents' welfare made it necessary and essential that they live near defendants. Further testimony revealed that the parents had no other place to live and that it would work a hardship both on the parents and the defendants if they could not continue to live in the mobile home on the property. Defendants' only other evidence to establish their defense was that two "permanent mobile" homes were located on property adjacent to that of the defendants. On appeal, defendants contend that the trial court erred by precluding evidence of personal hardship.

Defendants cite cases (cf. LaSalle National Bank of Chicago v. County of Cook, 12 Ill. 2d 40, 47 (1957),) for the proposition that hardship is generally one factor courts consider in determining the validity of a zoning ordinance and they contend that the trial court therefore erred by not considering hardship in this case. The hardship referred to in the cited cases is one that arises out of zoning regulations that arbitrarily restrict the use of the land and thereby amount to the taking of land without due process of law.



It is the economic hardship suffered by the owner of the property when the land cannot be put to its highest and best use. Here, the hardship claimed is not economical but personal to the defendants; it arises from their peculiar personal circumstances, not from arbitrary zoning regulations.

\*\*\*The hardship asserted as a ground for the variance must arise out of the zoning regulations; a hardship is insufficient where it is due to the status of the owner\*\*\*  
58 Am. Jur. §203

Defendants do not cite nor do we find a case where a personal hardship has been the basis for declaring an ordinance void. The trial court was correct in excluding the testimony on personal hardship. The judgment of the trial court is therefore affirmed.

Judgment affirmed.

RECHENMACHER, GUILD, J.J. - concur





73-276

UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss.  
Second District )

At a session of the Appellate Court, begun and held  
at Elgin, on the 3rd day of December, in the year of our  
Lord one thousand nine hundred and seventy-three, within and  
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice  
Honorable GLENN K. SEIDENFELD, Justice  
Honorable WILLIAM L. GUILD, Justice  
LOREN J. STROTZ , Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

November 1, 1974 the Opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures  
following, viz:



NO. 73-276

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

---

FILED

NOV 11 1974

COURT 1, 11:42, Clerk pro tem

---

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit
Plaintiff-Appellee	)	Court of the 18th
	)	Judicial Circuit,
v.	)	
	)	DuPage County, Illinois.
WILLIAM H. MOORE,	)	
	)	
Defendant-Appellant.	)	

---

MR. JUSTICE GUILD delivered the opinion of the court:

The defendant herein was indicted for the offense of burglary which occurred on October 1, 1971. After many continuances the defendant waived a jury trial, was tried by the court, found guilty, and on October 2, 1972/<sup>was</sup> sentenced to the State Penitentiary for a period of 2-6 years by the trial court.

The sole contention presented in this case is that the defendant was so intoxicated that he was unable to form the requisite intent required in burglary and that he was, therefore, not proven guilty beyond a reasonable doubt.

The premises in question where the burglary occurred was the office in an apartment complex located above the residence of the manager. The manager and his wife were awakened, went to the office in question, found that the office had been ransacked and the police found the defendant in the office and another burglar in the hall. Defendant had attended a party in the apartment complex and at about 11:00 in the evening drove one Shiela Dedick a mile and a half to her residence. He then turned the car around and returned to the apartment complex. He left the car and instructed Miss Dedick to pick him up if she saw him.



Shortly thereafter he was arrested, <sup>having been found</sup> hidden in the closet in the office of the apartment complex. At the time of his arrest in the apartment office police officer Rondeau, while advising the defendant of his rights, was interrupted by the defendant who said, "I also have a right to have a State appointed attorney?" The officer replied that that was correct if he could not afford one. Interestingly, the defendant asked the police officer for a cigarette which he proceeded to smoke while his hands were handcuffed behind his back. Several of the police officers testified that in their opinion the defendant was not intoxicated. His female companion, on the other hand, testified that in her opinion he was intoxicated, as did the defendant himself and the host of the party which he had attended. The defendant testified that he had drunk beer, wine and mixed drinks. The trial court in finding the defendant guilty stated that he did not base his decision on the testimony of the police officers. He stated that, in his opinion, if the defendant were able to drive his motor vehicle for a distance of a mile and a half, turn around and return to the premises in question without having an accident, and that he was able to sign the fingerprint card with sufficient clarity, that this indicated that the defendant was in sufficient possession of his faculties to know what he was doing. The judge stated that the evidence was "rather overwhelming" that the defendant possessed his faculties at the time in question. He found that the defendant was not intoxicated to the extent that he was rendered incapable of acting knowingly.

The defendant further testified that he did not recall having broken into the apartment in question. It is to be noted that the premises were entered by prying open the door with a crowbar. Defendant's contention is that, under the provisions of Section 6-3 of the Criminal Code, / (Ill.Rev.Stat. 1971, ch. 38, par. 6-3) he was so intoxicated



he did not know what he was doing. This statute reads  
in relevant part as follows:

" Intoxicated or Drugged Condition. A person who  
is in an intoxicated or drugged condition is  
criminally responsible for conduct unless such  
condition....:

(a) Negatives the existence of a mental state  
which is an element of the offense..."

There are numerous cases of recent date pertaining to the question  
of voluntary intoxication as a defense to a crime which requires  
intent. Probably the leading case on this subject is People v.  
Walcher (1969), 42 Ill.2d 159,<sup>163,</sup> 246 N.E.2d 256/<sup>259</sup> The court there  
stated:

"Voluntary intoxication will not provide a  
defense to conduct which the law regards as  
criminal unless the intoxication makes  
impossible the existence of a mental state  
which is an element of the crime. (Ill.Rev.  
Stat. 1967, ch. 38, par. 6-3; People v. Lion,  
10 Ill.2d 208, 214.) Here, the record does  
not show the appellant to have been intoxicated  
but it does show that his conduct at the time  
was with understanding and a criminal intent  
sufficient for the crime of murder."

The Supreme Court in People v. Lion, (1957) 10 Ill.2d 208,  
139 N.E.2d 757 stated that voluntary drunkenness was no excuse  
for the perpetration of a criminal act, but that the defense of  
voluntary drunkenness could be used to negative the essential  
elements of intent where the intoxication was so extreme as to  
entirely suspend the power of reason, but that merely being "drunk"  
or "intoxicated" was not a defense.

In People v. Tillman (1963), 26 Ill.2d 552, 187 N.E.2d 731,  
the Supreme Court in quoting, with approval, People v. Lion, supra,  
held that the testimony in the Tillman case fell "far short of  
bringing defendant within the purview of this rule, and the jury  
was entirely justified in concluding that the defendant's drinking  
had not completely deprived him of his ability to form the intent..."  
(187 N.E.2d at 734.) We find that to be the factual situation in  
the case before us. In People v. Fuller (1974) 17 Ill.App.3d 1005,





309 N.E.2d 96,<sup>98</sup>/this court considered a similar contention of voluntary drunkenness which purportedly was so extreme that defendant contended he could not form the necessary intent to commit the robbery therein charged. We feel that our statement contained in that opinion is applicable to the instant case and quote the same in full.

" The testimony of the defendant that he was unable to remember anything that he did during the time involved in the commission of the crime together with the evidence of his drunkenness raised questions of fact. For voluntary intoxication to be a legal excuse and render the specific intent to commit the crime impossible, the condition of intoxication must be so extreme as to suspend all reason. (People v. Rose (1970), 124 Ill.App.2d 447, 451, 259 N.E.2d 393) and make impossible the existence of a mental state which is an element of the crime. (People v. Walcher (1969), 42 Ill.2d 159, 163, 246 N.E.2d 256; People v. Gonzales (1968), 40 Ill.2d 233 241, 239 N.E.2d 783.) The jury could well have decided on the record that based on the officers' testimony the defendant was not intoxicated; or that under all the testimony he could not have been so intoxicated as to negate the required mental state."

Likewise, in People v. Litch (1972), 4 Ill.App.3d 788 at 791, 281 N.E.2d 745,<sup>747</sup>/we made the following observation which is applicable to the case before us:

"Voluntary intoxication is a defense to a crime requiring knowledge or intent and may be, and was here submitted to the jury as a defense. This is a factual matter for the determination by the trier of facts, here the jury, unless the finding is so contrary to the evidence that it cannot stand. The jury here did not believe that defendant was so intoxicated that he was not responsible for his actions."

We find from examination of the record herein that the finding of the trial court was not against the manifest weight of the evidence that the defendant's intoxication was not so great as to exclude his having the specific intent essential for the crime of burglary. Under these circumstances we will not substitute



our judgment for the trial court who is in a far better position to observe the witnesses and the defendant in this respect. The judgment of the trial court is affirmed.

AFFIRMED.

MORAN, T.J., P.J. and SEIDENFELD, J. CONCUR



23 I.A. 213<sup>3D</sup>

73-36

UNITED STATES OF AMERICA

State of Illinois     )  
Appellate Court     )     ss.  
Second District     )

At a session of the Appellate Court, begun and held  
at Elgin, on the 3rd day of December, in the year of our  
Lord one thousand nine hundred and seventy-three, within and  
for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice  
          Honorable WILLIAM L. GUILD, Justice  
          Honorable L.L. RECHENMACHER, Justice  
              LOREN J. STROTZ , Clerk Pro Tem  
              JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On  
October 31, 1974                   the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:





FILED

OCT 31 1971

J. S. STODOLSKY, Clerk of the Court  
Appellate Court, 2nd Floor

IN THE  
APPELLATE COURT OF THE STATE OF ILLINOIS  
SECOND JUDICIAL DISTRICT

MARY ALDA MC FEELY	)	
	)	
Plaintiff-Appellant,	)	
	)	Appeal from the Circuit Court
v.	)	for the 19th Judicial Circuit,
	)	Lake County, Illinois.
JAMES LAWRENCE MC FEELY,	)	
	)	
Defendant-Appellee.	)	

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

Plaintiff appeals from an order of the Circuit Court of Lake County reducing child support payments.

The divorce decree entered on November 24, 1971 found that 3 children were born of the marriage: Sharon, age 19, a junior in college; Christy, age 17, a high school senior; and Laurie, age 12, attending grade school. The decree granted to the wife custody, control and education of the younger 2 children who were the minors. The parties entered into a property settlement agreement testified to in open court which was approved in writing by counsel for each of the parties and was incorporated and "merged in" the divorce decree. Thereunder defendant was to pay plaintiff "for the support of the minor children" \$300 per month for the first 30 months, \$200 per month for the next 30 months, and "thereafter if the youngest child Lauri (sic) is in attendance at school or college" the sum of \$175 for 48 months. It provided further, among other things, that defendant pay Sharon's school costs to the end of June, 1972, and that "if the children go to college" relief could be sought from the court "for such aid from the Defendant in the child's college education as his ability to pay and the child's ability to contribute thereto may be equitable".



On September 8, 1972 (less than 10 months later) defendant petitioned the court for a reduction of \$100 in child support payments, alleging that the second daughter, Christy, was emancipated and not attending college, and that "the child support was based upon the children continuing their education". Plaintiff's answer admitted Christy's emancipation, denied the child support was based on their continuing education, and alleged that there was no sufficient change of circumstances to justify any reduction in the support allowance.

On October 24th the trial court entered an order finding that "the parties have stipulated and agreed that Christy ... is now nineteen (19) years old and has not resided with [plaintiff] since July 1, 1972, and is not attending college". The court therefore ordered that "support" for Sharon and Laurie be \$200 per month until Sharon concludes college, "then the child support shall be \$175.00 per month for Laurie ... on the terms and conditions set forth in the Decree". No evidence was presented at the hearing on defendant's petition and the order was obviously entered merely upon the stipulation referred to in the order.

Plaintiff contends that the court erred in reducing the support allowance in disregard of the express provisions of the property settlement agreement and the divorce decree absent any evidence of a change of circumstances, other than Christy's emancipation and non-attendance at school. It is true, as plaintiff points out, that the property settlement agreement between the parties confirmed by and incorporated in the decree imposed no condition or requirement that the daughter, Christy, go to college or continue to reside with the plaintiff. Instead it provided for bulk monthly support payments of \$300 for 30 months and \$200 for the next 30 months without condition. The only condition in the decree as to college attendance related to their



daughter, Laurie, in providing in substance that after the 60 month period during which support payments, first of \$300 per month and then \$200 per month, were to be made, defendant was to pay \$175 per month for 48 months if Laurie was in attendance at school or college. Another provision of the decree which indicated the absence of any condition of college attendance on the payment of the support money ordered to be paid was that which expressly contemplated and provided for recourse to the court for additional payments "if the children go to college".

However, Sec. 18 of the Divorce Act (Ill.Rev.Stat. 1971, ch. 40, par. 19) provides that the court "may, on application, from time to time, ... make such alterations in the allowance of ... maintenance, and the care, education, custody and support of the children, as shall appear reasonable and proper."

In Needler v. Needler (1971), 131 Ill.App.2d 11, where a property settlement agreement incorporated in the decree required the defendant to pay the same support allowance for the support of the twins even in case of the death of one of them, the court stated as follows (at p. 22):

"The incorporation of the property settlement agreement, ... into the divorce decree must be deemed to have been made in view of this statute [sec. 18 of the Divorce Act], and such statute by implication became a part of the decree; and the fact that the decree adopted the terms of the agreement did not destroy or affect the power of the court to alter the child support provisions upon a proper showing of a change of circumstances justifying modification."

In referring to the change in circumstances that court stated (at p. 21):

"These circumstances were clearly changed from the time when the original decree was entered and both children were alive and living at home, ... even though such a move may have been anticipated at the time that agreement was made."

Accordingly the court in Needler held that the trial court should have granted the defendant's petition to modify the provision for



support payments. That decision is controlling in the instant case.

We therefore hold that the emancipation and non-attendance at school of Christy is a change of circumstances which justified the trial court's reduction of the provision for support and its judgment is therefore affirmed.

Affirmed.

GUILD AND SEIDENFELD, JJ., concur.





73-326

UNITED STATES OF AMERICA

State of Illinois       )  
Appellate Court       )   ss.  
Second District       )

At a session of the Appellate Court, begun and held  
at Elgin, on the 3rd day of December, in the year of our  
Lord one thousand nine hundred and seventy-three, within and  
for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice  
          Eonorable L. L. RECHENMACHER, Justice  
          Honorable WILLIAM L. GUILD, Justice  
          LOREN J. STROTZ , Clerk Pro Tem  
          JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

OCT 25 1974

the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:



FILED

IN THE

APPELLATE COURT OF THE STATE OF ILLINOIS

SECOND JUDICIAL DISTRICT

DUREN J. STROTT, Clerk pro tem  
Appellate Court, 2nd District

---

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellant,	)	Appeal from the Circuit
	)	Court for the 17th Judicial
v.	)	Circuit, Winnebago County,
	)	Illinois.
OLEN BELL,	)	
	)	
Defendant-Appellee.	)	

---

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

The defendant was charged by indictment with the crime of forgery. He moved to dismiss the indictment on the ground that the indictment did not state facts sufficient to constitute the offense of forgery under the statute relating to that crime. The trial judge, after argument of counsel, agreed with defense counsel that the facts alleged did not constitute the crime of forgery and dismissed the indictment. From this ruling the State appeals.

Other than the pleadings in connection with the motion to dismiss the indictment, the record consists only of the arguments of counsel at the hearing on the motion to dismiss. There was no oral argument. The factual situation therefore is somewhat obscure. It appears, however, that a woman giving the name of Ann Hammond went to the Park State Bank at Loves Park, Illinois and opened an account at that bank in the name of Colt Sales Company, 2511 North Main, Rockford, Illinois. She made a deposit to the account of Colt Sales Company (the amount of the deposit not being of record) and signed a signature card, specifying that Ann Hammond was the only person who was entitled to draw checks on that account.

The defendant procured a check for \$128, purportedly

on the account of Colt Sales Company, signed by Ann Hammond, and payable to one Domingo Lara. Defendant then cashed this check at the service station of one Kenneth Anderson after endorsing it in the payee's name. The check was returned to Anderson NSF.

While the facts are not entirely clear from the record before us, it appears that after a complaint had been made by Anderson the State's Attorney investigated and discovered that there was no such actual person as Ann Hammond, although the person who signed the signature card in that name at the bank apparently signed the check in question under the name of Ann Hammond as maker.

The defendant contends that these facts do not constitute the crime of forgery under the statute defining that crime which reads in pertinent part as follows (ch. 38, sec. 17-3, Ill.Rev.Stat. 1971):

"(a) A person commits forgery when, with intent to defraud, he knowingly:

"(1) Makes or alters any document apparently capable of defrauding another in such manner that it purports to have been made by another or at another time, or with different provisions, or by authority of one who did not give such authority; or

"(2) Issues or delivers such document knowing it to have been thus made or altered; or

"(3) Possesses, with intent to issue or deliver, any such document knowing it to have been thus made or altered."

The defendant argues that since Ann Hammond, who opened the checking account, did actually sign the check it was a valid check, not a forgery. He maintains that there is a distinction between a fictitious person and a person using a fictitious name and that the check in question did not purport to be made by "another" since Ann Hammond, the maker, actually signed the check. The defendant points out that the check was actually declined as "NSF" and not as a forgery and that if it

had been for an amount less than the balance in the account (which was \$69) it would have been honored. He argues that the difference in the amount cannot make it a forgery in one case and not a forgery in another.

The State invokes the case of People v. Lanners (1970), 122 Ill.App.2d 290, as refuting the defendant's argument that a genuine signature under a fictitious name could not constitute a forgery. In that case the defendant admitted he drew certain checks with intent to defraud, using the name of a fictitious person in each case as the pretended maker. It was defendant's theory that the phrase "purports to have been made by another" did not include a fictitious person as "another" and, indeed, under the forgery statute in force previously (ch. 38, sec. 105) it was held, in People v. Gould (1932), 347 Ill. 298, that the signing of a fictitious name as the maker did not amount to forgery.

In Lanners, however, the court distinguished between the Gould case supra and the case then before it saying:

"The stipulated acts of Lanners here would have constituted the crime of drawing or uttering fictitious bills, notes, checks, etc. under section 279 of the old law. This section has been included in the codification of the present section 17-3, supra. (See SHA, c 38, §17-3, 'Committee Comments.')

In Gould, the court was distinguishing between the crime of forgery, as then narrowly defined, and the crime of fictitious paper, which was then covered by a different section of the Criminal Code. Each were distinct and different offenses. However, the present Criminal Code broadly incorporates all forms of forgery into a single crime." (emphasis added) (122 Ill.App.2d at 293.)

See also People ex rel. Miller v. Pate (1969), 42 Ill. 2d, 283, which provides an interesting comment on the evolution of the present forgery statute.

In line with Lanners we find the acts of the defendant here to come within the meaning of section 17-3 of the Criminal Code defining forgery. We consider the words "purports to have

been made by another" as including the use of a fictitious name and that "another" can mean not only a different living person than the actual maker but a nonexistent person purporting to be the maker, where such fictitious name is used with intent to defraud by concealing the true identity of the maker or giving the instrument a spurious credibility.

We believe the trial court construed the statute too narrowly. The gravamen of the offense is the intentional deceit in making and uttering the instrument and where a fictitious name is used as maker in furtherance of the fraudulent scheme the State should not be blocked by a semantic distinction as to whether "another" means only a living actual person not the maker or includes as well "another" who in fact does not exist at all. In either case the instrument purports to be made by "another" than the person who actually made it. We believe the statute was intended to cover such a case.

We therefore are of the opinion that the indictment in this case properly charged the crime of forgery and the indictment should not have been dismissed.

Reversed with instructions to allow reinstatement of the indictment.

GUILD and SEIDENFELD, JJ., concur.



74-24

UNITED STATES OF AMERICA

State of Illinois     )  
Appellate Court     )     ss.  
Second District     )

At a session of the Appellate Court, begun and held  
at Elgin, on the 3rd day of December, in the year of our  
Lord one thousand nine hundred and seventy-three, within and  
for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice  
          Honorable WILLIAM L. GUILD, Justice  
          Honorable L.L. RECHENMACHER, Justice  
          LOREN J. STROTZ , Clerk Pro Tem  
          JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On  
November 18, 1974 the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:



FILED

NOV 15 1974

IN THE  
APPELLATE COURT OF THE STATE OF ILLINOIS  
SECOND JUDICIAL DISTRICT

LOREN J. STROZY, Clerk pro tem  
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
	)	Appeal from the Circuit
v.	)	Court for the 17th Judicial
	)	Circuit, Winnebago County,
REX MATREL BOOTHE,	)	Illinois.
	)	
Defendant-Appellant.	)	

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

After a jury trial defendant was convicted in 1965 of murder and sentenced to a term of 20 to 30 years in the penitentiary. On appeal this court reversed and remanded for failure of the trial court to tender instruction on voluntary manslaughter. (People v. Boothe (1972), 7 Ill.App.3d 401.) Defendant was retried in July, 1973, was again convicted of murder and sentenced to a term of 20 to 30 years. Defendant appeals from that judgment.

The evidence shows that in May of 1965 the defendant arrived at the home of his "girl friend" (with whom he had lived) and following an argument with her in the presence of her 11-year-old daughter beat his girl friend with his fists, picked up 2 butcher knives, slapped and stabbed the victim to death. There were over 50 stab wounds on the victim.

At the sentencing hearing following the second trial testimony was received that during his almost 8 1/2 years in prison he sincerely accepted religion, had only 9 disciplinary reports including 2 days isolation, and that defendant's mother wrote to defendant that upon his release from prison he would have a job and a place to live in Jamaica.

Defendant contends on appeal that the minimum sentence



was excessive and should be reduced to 14 years because the trial court did not, when it imposed sentence, make reference to defendant's character or prison record but only to the seriousness of the offense; that the trial court did not take into account defendant's rehabilitation potential reflected during his prison stay. He calls attention to Section 5-8-1(c) of the Unified Code of Corrections (Ill.Rev.Stat. 1973, ch. 38, par. 1005-8-1(c)) which provides a minimum term of 14 years for murder "unless the court, having regard to the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum".

The defense was given the opportunity to, and did, present a very thorough sentencing hearing and defense counsel very ably argued the evidence in mitigation prior to sentencing.

A reviewing court will not set aside a sentence unless the record clearly shows that the trial judge manifestly abused his statutory discretion to impose sentence. (People v. Taylor (1965), 33 Ill.2d 417. See also People v. Nelson (1968), 41 Ill.2d 364, 368 and People v. Lutz (1974), 17 App.3d 1001, 1003-1004.) This was without question a vicious murder, and the minimum sentence imposed by the trial judge was only 6 years more than the 14 year minimum allowable under the statute. In People v. Sprinkle (1974), 56 Ill.2d 257, 264, the Supreme Court in approving sentences of 75 to 90 years imposed on 2 defendants (one 14 and the other 15 years old) said:

"The trial court is normally in a better position during the trial and hearing in aggravation and mitigation to make a sound determination as to the punishment to be imposed than are courts of review."

See also People v. Lane, Docket No. 72-166, 2nd Dist., (1974),  
\_\_\_\_\_ Ill.App.3d \_\_\_\_\_.

Since our examination of the record indicates that the trial judge gave careful consideration both to the nature of the



offense and to defendant's history and character when it set the higher minimum of 20 years in imposing sentence, the judgment of the trial court is affirmed.

AFFIRMED.

GUILD and SEIDENFELD, JJ., concur.





UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss.  
Second District )

At a session of the Appellate Court, begun and held at Elgin, on the 3rd day of December, in the year of our Lord one thousand nine hundred and seventy-three, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice  
Honorably WILLIAM L. GUILD, Justice  
Honorably L. L. RECHENMACHER, Justice  
LOREN J. STROTZ , Clerk Pro Tem  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

NOV 12 1974 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



FILED

No. 72 383

NOV 18 1974

IN THE  
APPELLATE COURT OF THE STATE OF ILLINOIS  
SECOND JUDICIAL DISTRICT

LOREN J. STANIZ, Clerk pro tem  
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, ) Appeal from the Circuit  
 ) Court for the 17th Judicial  
v. ) Circuit, Winnebago County,  
 ) Illinois.  
JAMES PRITCHETT, )  
 )  
Defendant-Appellant. )

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

Following a jury trial defendant was found guilty of felony murder and burglary, and was sentenced to a term of 20 to 30 years. On appeal his sole contention is that the written confession and his later oral admissions which were elicited from him were tainted by his being falsely told that the police officers had recovered his fingerprints at the scene of the crime and were therefore involuntary and inadmissible.

The testimony shows that the defendant was brought to the Rockford police station (on an unrelated burglary charge) at about 4:45 A.M. on September 23, 1971. Detectives Ladwig and Price took him to an office in the Detective Bureau. There Detective Price gave the defendant the warning as to his rights (mandated by Miranda v. Arizona (1966), 384 U.S. 436, 476), by giving the defendant a copy of a Rights Waiver Form, and reading each right to the defendant, and asking him if he understood it. In each case the defendant said he did. At about 5:04 A.M. defendant signed the Rights Waiver Form and stated that he was willing to talk. For about 5 minutes the officers questioned him about the unrelated burglary charge. They then interrogated him about a burglary and homicide of one William Shoemaker at the First Presbyterian Church of Rockford where Shoemaker's body had



been found on the morning of July 9, 1971. For the first 30 minutes defendant denied that he was involved in that crime. During the interrogation the officers told defendant, or led him to believe, that fingerprints recovered from the scene of the crime were those of the defendant when, in fact, they did not have defendant's fingerprints. They also told defendant they had recovered a belt and the victim's wallet which were being checked for fingerprints and that if defendant had handled them in any way his fingerprints would "come up", and that this fact, along with statements of others, would give them enough evidence to charge him with murder. Thereupon the defendant admitted knowledge of, and participation in, the crime. At about 5:45 A.M. Detective Ladwig began typing defendant's 3-page confession which defendant verified by reading and signing each page at 7:25 A.M. He was then booked into a cell at the city jail. It should be noted that during the questioning defendant was given a cup of coffee and was permitted to use the bathroom.

At 9:30 A.M. Detectives Ladwig and Price and Officer Jackson saw defendant in his cell and asked him if he would take them to the church and reenact his activities on the night of the crime. Defendant said he would and proceeded to follow with the officers the route which he stated he and one Billy Davenport took to the church. Defendant described his role as a lookout for the police. He led them into the church, reenacted his conduct and the conduct of "Davenport" and pointed to various relevant locations. During this reenactment color photographs were taken of defendant and were received in evidence, and defendant never requested an attorney or the termination of his interrogation. No threats or promises were made to defendant either earlier or during that reenactment. Defendant was then returned to his cell sometime between 11:00 A.M. and 12:00 noon.





There is no question but that the officers deceived defendant into believing that they had his fingerprints when in fact they did not. Courts will invalidate confessions resulting from a subterfuge that is likely to produce an untrustworthy confession. (U.S. ex rel. Caminito v. Murphy (1955), 222 F.2d 698, Cert. denied 350 U.S. 896.) Moreover, illegal methods may not be used by police in obtaining confessions. Spano v. New York (1959), 360 U.S. 315, 321.

After a careful review of the record we are not convinced that the deception of the defendant concerning the recovery of his fingerprints and the reference to statements implicating him was likely to cause an untrustworthy confession or to be so reprehensible as to invalidate the confession as being offensive to basic notions of fairness. Frazier v. Cupp (1969), 394 U.S. 731, 739. See also People v. Watkins (1970), 6 Cal.App.3d 119, 124-125, 85 Cal.Rptr. 621, 624.

There was no misrepresentation by the police of the defendant's constitutional rights. The only misrepresentation was as to the evidence against him. Such misrepresentation, even though intentional, while not condoned, is not the kind of statement as would render his waiver of the "Miranda rights" unknowing and unintelligent and did not taint defendant's confession or his subsequent oral admissions. See People v. Gunn (1973), 15 Ill.App.3d 1050, 1055; People v. Schutz (1972), 8 Ill. App.3d 827, 832-833; Commonwealth v. Jones (1974), 322 A.2d 119, 124-125; and Anno. 99 A.L.R.2d 772.

The judgment of the Circuit Court of Winnebago County is therefore affirmed.

AFFIRMED

GUILD and SEIDENFELD, JJ., concur.



74-188

People vs. John Edward Strickland

STATE OF ILLINOIS



APPELLATE COURT      THIRD DISTRICT  
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,  
on the 1st Day of January in the Year of our Lord one thousand  
nine hundred and seventy-four, within and for the Third District  
of Illinois:

Present— PC

HONORABLE ALBERT SCOTT, Presiding Justice

HONORABLE ALLAN L. STODER, Justice

HONORABLE JAY J. ALLOY, Justice

HONORABLE WALTER DIXON, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on  
November 19, 1974 the Opinion of the  
Court was filed in the Clerk's Office of said Court, in the words  
and figures following, viz:



In The  
APPELLATE COURT OF ILLINOIS  
Third District  
A. D. 1974.

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
 )  
vs. )  
 )  
JOHN STRICKLAND, )  
 )  
Defendant-Appellant. )

Appeal from the  
Circuit Court of  
Knox County

---

PER CURIAM

**Abstract**

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This is an appeal from a judgment of the Circuit Court of Knox County wherein defendant, following a plea of guilty to felony theft, was sentenced to a term of not less than 2 nor more than 6 years in the Illinois State Penitentiary. The office of the State Appellate Defender was appointed to represent defendant in this appeal in this Court. The Appellate Defender has now moved for leave to withdraw as counsel on appeal in accordance with the precedent in Anders v.

California, 386 U.S. 738. It is stated by the Appellate Defender that after a careful examination of the record, the conclusion must be reached that an appeal would be totally frivolous and could not possibly afford defendant any relief. The motion for leave to withdraw was accompanied by a brief in support of counsel's conclusion.

The record indicates that defendant John Strickland was charged by information with the elements of felony theft (theft over \$150). The information properly set forth all of the elements of felony theft and properly conferred jurisdiction. After defendant Strickland was advised by the court of the nature of the charge, the potential minimum and maximum sentence, and the fact that he could only be prosecuted after indictment by the Grand Jury unless he waived indictment, Defendant did waive indictment. Defendant pleaded guilty following plea negotiations, and was sentenced to a term of not less than 2 nor more than 6 years, as we have indicated. The court admonished Strickland



again of the nature of the charge and the minimum and maximum sentence, including the 3-year mandatory parole term. The court then determined that defendant waived the right to jury trial and the right to confront witnesses and defendant, also, furnished the factual basis for the offense upon questioning by the trial judge and assured the court that the plea was voluntary and he was satisfied with the services provided by his appointed counsel.

The terms of the plea negotiation were stated on the record and the court conditionally concurred pending review of the presentence report and a hearing in aggravation and mitigation. Following the receipt of the report and discussion of its contents, defendant waived a hearing in aggravation and mitigation and, also with respect to probation, and the trial judge accepted the plea and concurred in the negotiated sentence. The 2 to 6 year sentence which was imposed was within the statutory range for a Class 3 felony (Ill. Rev. Stat. 1973, ch. 38, sec. 1005-8-1). The greater than minimum sentence was justified, by the prior criminal record established by Strickland and his previous failure on probation as shown by the presentence report.

In view of the record, we concur in defense counsel's conclusion that there is no basis for maintaining an appeal in this cause and that a continuation of the appeal would be wholly frivolous and could not possibly succeed. The judgment of the Circuit Court of Knox County is, therefore, affirmed and the motion of the State Appellate Defender to withdraw as counsel for defendant John Strickland is allowed.

Judgment affirmed and  
Withdrawal motion allowed.





30  
23 I.A. 419

(24540-4M-9-70) 160 o



## STATE OF ILLINOIS

## APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

## PRESENT

HONORABLE LELAND SIMKINS, Presiding Judge  
HONORABLE JAMES C. CRAVEN, Judge  
HONORABLE HAROLD R. CLARK, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 6th day  
of November A. D. 1974, there was filed in the office of  
which opinion, as modified December 18, 1974 is  
the Clerk of the Court an opinion of said Court/in words and figures  
following:



FILED

STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

NOV 6 1974

Robert L. Conn, CLERK  
APPELLATE COURT 4TH DISTRICT

General No. 12293

Agenda No. 74-80

MODIFIED AS OF  
DECEMBER 18, 1974

THE PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee )  
 )  
v. )  
 )  
EARL HAMILTON, )  
 )  
Defendant-Appellant )

Appeal from  
Circuit Court  
Sangamon County  
769-72

---

Opinion as modified upon denial of petition for rehearing.

MR. JUSTICE CLARK delivered the opinion of the court:

Defendant Earl Hamilton was indicted on November 15, 1972, for the offense of aggravated battery on Eugene Robinson, an individual whom he knew to be a peace officer, while said officer was engaged in the execution of his official duties as Sangamon County Deputy Sheriff. The incident was alleged to have taken place on October 16, 1972, while defendant was incarcerated in the Sangamon County jail awaiting trial on a charge of armed robbery. After entering a plea of not guilty at the time of arraignment, the defendant was tried by a jury and found guilty of the charge of aggravated battery. Thereafter, judgment of guilty was entered on the verdict of the jury, and he was sentenced to serve a term of 1 to 5 years in the penitentiary, to run concurrently with another sentence being served for armed robbery.



Three issues are raised in defendant's appeal: (1) the sufficiency of the indictment; (2) the State's prejudicial closing argument; and (3) the defendant was not proven guilty of aggravated battery beyond a reasonable doubt.

The evidence indicates that on the night of October 16, 1972, at about 11 p.m., the defendant was standing near the inner door of the cell block when a number of deputy sheriffs entered the cell block. After an altercation, Hamilton was removed from the cell block. Six deputy sheriffs who entered the cell block were called by the State as witnesses. The defendant testified in his own behalf along with other prisoners who were in the cell block at the time of the incident. There were numerous conflicts in the evidence.

The State's evidence consisted of the testimony of the deputy sheriffs involved in the incident. Robinson testified that he had been a deputy sheriff for six years, and was on duty the evening of October 16, 1972. When he came on duty about 11 p.m., he was informed by the sergeant on the previous shift that four prisoners had refused to return to their cells and lock up for the night. The regulations at the jail required that all prisoners return to their cells at 10 p.m. for lockup. The defendant was one of the four prisoners named by the sergeant that would not lock up. Robinson further testified that shortly after 11 p.m. when he came on duty, he went back to the cell block with deputies Rhodes, Brents, Diaz, Welchert, Vala, and possibly two others whose names he could not recall. The deputies were from both shifts. As deputy





Robinson arrived at the cell block, he asked the prisoners what was wrong. The jailer pushed the button so he could open the door. As he pushed the door open and went inside, Hamilton hit him with his fist on his left cheek two or three times.

Robinson, who was in uniform, stated that he had not provoked Hamilton, and that Hamilton had not said anything to him. The other deputies then rushed in, and Robinson struck back at Hamilton. With the help of the other deputies, Hamilton was subdued and taken or carried by his arms and legs to another section of the jail. Robinson stated he did not see any of the deputies carrying nightsticks or blackjacks. He testified he had not known Hamilton prior to the incident.

Deputies Brents, Dalby, Vala, Barley and Weichert also testified that they accompanied Robinson back to the cell block, and generally corroborated the testimony of Robinson, although several deputies did not see the blows as they were not inside the door of the cell block until after the altercation was over.

Several prisoners from the Sangamon County jail were called as witnesses for the defense.

The witness Fears testified that he was the "floor man" for the cell block. He stated that the jailer had asked him to get the other prisoners to lock up. Fears replied that they were grown men; that he had no control over them, and it was not part of his duties to get them to lock up. He stated further that the prisoners had not refused directly to lock up, although the jailer did ask him



to get them into their cells for the night. Fears also testified that the jailer again asked him if the prisoners were going to lock up, and at that time the deputies came in and the door hit Hamilton and knocked him off balance; the deputies then hit Hamilton with slapsticks knocking him to the ground as he was trying to get away. In his opinion, Hamilton was unconscious when the deputies carried him out of the cell block to an isolation cell. Fears stated that Hamilton was the only prisoner who was beaten by the deputies.

Other prisoners in the cell block were called to testify for the defense, namely, Barker, McGuire, Miller, McNear and Neely, and they generally corroborated the testimony of the witness Fears.

The defendant testified in his own behalf that on the night in question he was looking at the clock, and was about a foot-and-a-half from the door when the deputies came in. Deputy Brents opened the door, and it struck him in the chest and chin. He lost his balance, and deputy Robinson came toward him followed by others, and Robinson started beating him. He has no recollection of being removed from the cell block. On cross-examination, Hamilton stated he was never directed by a deputy to go into his cell, and that he did not hit Deputy Robinson. The defendant testified that he had two lawyers, Mr. O'Keefe and Mr. Casper, at the time, and he told Mr. Casper about the altercation but the attorney did not file any complaint against the deputies. He stated that he also told the sheriff about the incident.



In rebuttal, the prosecution called attorney O'Keefe who stated that he represented the defendant Hamilton on October 16, 1972. Attorney O'Keefe stated that he saw Hamilton the morning after the incident in the detention area at the County Jail. Hamilton was nude from the waist up, wearing only a blanket over his shoulders. He looked as if he had just been awakened. His face was puffy and slightly reddened, and he showed O'Keefe a red area on his back. But the attorney testified he did not observe any bruises, cuts or scratches.

The only questions directed to defendant's attorney O'Keefe on direct or cross-examination were relating to defendant's physical appearance on the morning after the incident.

One of the issues raised by the defendant is the sufficiency of the indictment for aggravated battery. The indictment provides in part as follows:

"Earl Hamilton committed the offense of AGGRAVATED BATTERY when he committed a battery on Eugene Robinson, an individual he knew to be a peace officer, while Eugene Robinson was engaged in the execution of one of his official duties as a Sangamon County Deputy Sheriff, namely, he struck Eugene Robinson about the head and face with his fists causing harm to Eugene Robinson, . . ."

Defendant argues that the indictment charges the commission of a battery upon a police officer; however, it fails to allege which of the alternative elements of battery is being charged by the State in the commission of the offense. The statutory definition of battery provides alternative ways to charge the offense with reference



to the specific conduct which is purported to constitute the battery. In one of the alternatives, a charge of battery may be based upon conduct which "causes bodily harm to an individual", and, in the second way, a battery may be based upon "physical contact of an insulting or provoking nature." (Ill. Rev. Stat. (1973) ch. 38, par. 12-3.) Defendant argues that the indictment fails to specify the basis for the allegation that a battery was committed, and fails to include an allegation that the defendant acted either intentionally or knowingly. Defendant cites the Fifth District case of People v. Latham, 13 Ill.App.3d 371, 299 N.E.2d 808. For these reasons defendant argues that the indictment fails to sufficiently state an offense under the Criminal Code.

The State relies on the case of People v. Harvey and Hussey, 53 Ill.2d 585, 294 N.E.2d 269, in which the Illinois supreme court set out the rule for determination of the sufficiency of indictments as follows:

"The requisites for determination of the sufficiency of an indictment are enunciated in the Code of Criminal Procedure. (Ill. Rev. Stat. 1969, ch. 38, par. 111-3.) As we have held, the indictment must be such as to inform the accused of the nature of the charge, thus allowing him to prepare a defense, and to serve as a bar to a future prosecution for the same offense. (People v. Ross, 41 Ill.2d 445, 448; People ex rel. Miller v. Pate, 42 Ill.2d 283, 285, and cases cited therein.) An indictment which is phrased in terms of the statutory offense may be valid if the words 'so far particularize the offense that by their use alone an accused is apprised with reasonable certainty of the precise offense with which he or she is charged.' People v. Patrick, 38 Ill. 2d 255, 258." (53 Ill.2d at 585)

The indictment in this case charges the defendant with





committing a battery on a person he knew to be a peace officer. The defendant was incarcerated at the time, and the peace officer was in uniform. The indictment in this case alleges that the offense charged occurred during the commission of a battery. We find that the indictment sufficiently informed the defendant of the charge and would operate to bar a subsequent prosecution.

Defendant also contends that the prosecutor's closing argument was prejudicial. In the prosecutor's closing argument, the defendant and his witnesses were called criminals "who commit crimes over and over. Some of them are hardened criminals, and you have heard some of them testify here just this morning." Explaining why these witnesses would lie, the prosecutor said that it was because "they hate everything to do with law and order; that they dislike everything that you and this courtroom stand for-- truth, honesty and justice; that they have demonstrated they hate because of the number of felonies they have been convicted of." The prosecutor then stated that he could add "from my own personal knowledge" that the five or six deputies who testified for the State are "the real finest deputies that we have. They are all good; that these were particularly good deputies." He then asked the jury whether or not they are going to believe the police officers or the eight or nine convicted felons that the defendant dragged into the courtroom.

The record indicates that the defense counsel made no objections to the prosecutor's argument; however, it is improper



for the prosecutor to personally vouch for the credibility of the witnesses who in this case were deputy sheriffs. It was unnecessary to call the defense witnesses "hardened criminals", although he could properly comment on their criminal records.

In final argument to the jury, counsel are given wide latitude in presenting their case. While the argument was improper, in light of all the facts and circumstances of this case, we are unable to say that the remarks made by the prosecutor influenced the result or that the verdict could have been otherwise, had the remarks not been made. People v. Naujokas, 25 Ill.2d 32, 182 N.E.2d 700.

The last point urged by defendant is that he was not proved guilty of aggravated battery beyond a reasonable doubt. The defendant contends that there was a direct conflict in the testimony of the six deputy sheriffs who testified for the prosecution, and the six witnesses and the defendant who testified for the defense. The question of credibility is for the jury. People v. Gray, 33 Ill.2d 349, 211 N.E.2d 369.

In People v. Novotny, 41 Ill.2d 401, 244 N.E.2d 182, the court stated:

"It is neither the duty nor the privilege of a reviewing court to substitute its judgment as to the weight of disputed evidence or the credibility of witnesses for that of the trier of fact who heard the evidence presented and observed the demeanor of the witnesses (People v. Mills, 40 Ill.2d 4,19; People v. Anderson, 30 Ill.2d 413; People v. Orlando, 380 Ill. 107, cert. denied 317 U.S. 694, 87 L.Ed. 555, 63 S.Ct. 435); and we will not reverse a criminal conviction where the evidence is not so improbable as to raise a reasonable doubt



of guilt. People v. Mills; People v. Ashley,  
18 Ill. 2d 272, cert. denied 363 U.S. 815,  
4 L.Ed.2d 1157, 80 S.Ct.1255." (41 Ill.2d at 412)

For the reasons above stated, the judgment of the circuit  
court of Sangamon County is affirmed.

JUDGMENT AFFIRMED.

SIMKINS, P.J., and CRAVEN, J., concur.





23 I.A. <sup>3D</sup> 431

(24540-4M-9-70) 160-o



## STATE OF ILLINOIS

## APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

## PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 21st day  
of November A. D. 19 74, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:



STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

General No. 12532

Agenda No. 74-203

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee	)	
	)	
v.	)	Appeal from
	)	Circuit Court
CHARLES SILAGY,	)	Vermilion County
	)	72-CF-156
Defendant-Appellant	)	

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Mr. JUSTICE CRAVEN delivered the opinion of the court:

The State appellate defender has moved to withdraw as defendant's counsel. A brief in conformity with Anders v. State of California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, accompanies the motion. Defendant has filed a pro se objection to the withdrawal.

Defendant entered a plea of guilty to a charge of incest pursuant to a plea negotiation agreement by which the State agreed to dismiss a rape charge against him. After a hearing in aggravation and mitigation, defendant was sentenced to a term of 6 to 10 years in the penitentiary. We reviewed this conviction and sentence in People v. Silagy, 13 Ill.App.3d 339, 300 N.E.2d 30. We vacated the sentence and remanded the case to the circuit court of Vermilion County with directions to impose a sentence appropriate under the



Unified Code of Corrections. (Ill.Rev.Stat. (1972 Supp.) ch. 38, §§ 1005-8-1, 1008-2-4.) Following a new sentencing hearing, defendant was sentenced to a term of imprisonment of not less than 3 years 4 months, nor more than 10 years. The defendant again appeals.

In his pro se objections to his counsel's requested withdrawal, defendant contends the 10-year maximum term imposed by the court violates the Unified Code of Corrections. He states there is a Code provision providing that the sentence on a second felony conviction should be twice the minimum and twice the maximum sentence imposed on the first conviction when the convictions result from correlated offenses. Defendant received a 1 to 3-year sentence in 1970 on an attempted rape conviction. Contrary to defendant's assertions, no such provision relating to sentencing is contained within the Code that is here applicable.

The only possible justiciable issue presented by this case is the 3 year 4 month to 10-year term of imprisonment imposed upon defendant. The record indicates defendant has previous convictions for aggravated battery and attempted rape. The sentence imposed upon the 23-year-old defendant for this incest conviction is within the statutory guidelines for a Class 3 felony. Considering the serious nature of this offense and defendant's past record, we cannot say that the sentence is excessive. Accordingly, it is our conclusion that a further review of this case would be frivolous and without merit.

Therefore, the motion of counsel to withdraw is allowed and the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

SMITH, P.J., and TRAPP, J., concur.



23 I.A. 479<sup>3D</sup>

(24540-4M-9.70) 160-o



## STATE OF ILLINOIS

## APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

## PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

---

BE IT REMEMBERED, that to-wit: On the 21st day  
of November A. D. 1974, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:









during the night when the children were present, sleeping with men and having intercourse with them in her home, and (5) stating that she did not want the children except for the support money.

The trial court's memorandum decision found that the wife had not strictly complied with the visitation rights under the decree and more or less left it up to the children but indicated that this was a basis for citation rather than a change of custody. He also found that the evidence did not support the charge that the children were not adequately clothed and well fed, that the educational failure of one of the children because of inadequate educational supervision was not supported by the evidence, that the allegations of immoral conduct and association with men in the presence of the children was not established, nor does the record show that such men were of the lowest moral character as charged. The charge that the wife stated that she didn't want the children except for the money is wholly uncorroborated, and her attention to the children at school functions, little league games, Boy Scouts, and like public functions defies this statement. It would unduly extend this opinion to recite the improprieties leveled at this mother. The daughter's testimony was that the children didn't want to go to another town to live with their father and stepmother, and that she quarreled with her father both before and after the separation.



We necessarily conclude that the trial court properly appraised the situation and set it forth in his written opinion to the parties. His conclusions and findings are amply supported by the evidence in this record. He warned the parties that they did not appear to cooperate in the matter of visitation and if necessary, he would prescribe the time and circumstances of such visitation, but that such ought not be required.

This court recently enunciated the rules governing a change in child custody in Sorenson v. Sorenson, 10 Ill.App. 3d 980, 295 N.E.2d 347, and they need not be reiterated here. In brief, this record fails to establish that there has been a material change of circumstances since the divorce decree which affects the welfare of the children and that the petitioner failed to establish and to carry the burden of proof as to his allegations of the mother's improper conduct or inattention to the children's welfare. The trial court in matters concerning child custody is in a better position to determine the welfare and best interests of the children and the credibility or incredibility of the witnesses. On this record, the trial judge did not abuse his discretion in leaving the children with the mother.

Accordingly, the judgment of the trial court is affirmed.  
Affirmed.

TRAPP and CRAVEN, JJ., concur.



3D  
23 I.A. 491

(24540-4M-9-70) 160 a

## STATE OF ILLINOIS

## APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

## PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 6th day  
of November A. D. 1974, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:





STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

General No. 12403

Agenda No. 74-117

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee	)	
	)	
v.	)	Appeal from
	)	Circuit Court
QUINTIN WALLACE,	)	Sangamon County
	)	472-72
Defendant-Appellant	)	

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Mr. JUSTICE CRAVEN delivered the opinion of the court:

Defendant was initially charged with one count of armed robbery and one count of robbery. On September 29, 1972, he entered a plea of guilty to the offense of armed robbery. At the presentence hearing, he was sentenced to an indeterminate term of 5 to 7 years. He did not appeal from his conviction or sentence. On May 23, 1973, he filed a pro se petition for post-conviction relief. The petition alleged that defendant wanted to proceed as an indigent and that the primary ground for relief was that the sentence of 5 to 7 years was unconstitutionally excessive.

Page 1 of the petition noted:

"Sir, please refer original and copy to Chief Judge pro se petition. I don't want no attorney to only delay case. I want petition heard as it is. Prepared by legal consultant in criminal matters Edward John 37464."



The trial court eventually dismissed the petition on the grounds that it failed to urge a substantial denial of rights arising under the state or federal constitution. The trial court did not appoint counsel to determine whether defendant had any other claims cognizable under the Post-conviction Hearing Act (Ill.Rev.Stat. 1971, ch. 38, ¶ 122-1, et seq.). Defendant filed a timely notice of appeal and the trial court then appointed the defender project to represent defendant on appeal.

The issue on appeal is whether defendant knowingly and intelligently waived his statutory right to counsel, as provided in section 4 of the Post-conviction Hearing Act (Ill.Rev. Stat.1971, ch. 38, ¶ 122-4), for the purposes of the post-conviction proceedings. We find that defendant's waiver was adequate.

Defendant's claim does not depend upon the federal or state constitutional right of counsel, but rather upon section 4 of the Post-conviction Hearing Act. Section 4 states:

"If the petition alleges that the petitioner is unable to pay the costs of the proceeding, the court may order that the petitioner be permitted to proceed as a poor person and order a transcript of the proceedings delivered to petitioner in accordance with Rule of the Supreme Court. If the petitioner is without counsel and alleges that he is without means to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested, the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel." (Ill.Rev.Stat.1971, ch. 38, ¶ 122-4.)



The section provides that a post-conviction petitioner has the right to the assistance of counsel upon request. The supreme court has acknowledged the significance of that right on numerous occasions. See People v. Slaughter, 39 Ill.2d 278, 235 N.E.2d 566; People v. Dye, 50 Ill.2d 49, 277 N.E.2d 133; People v. Brittain, 52 Ill.2d 91, 284 N.E.2d 632.

While the statutory right to counsel is a substantial right, it may be waived. Yet such a waiver cannot be lightly assumed by the trial court. It must be made knowingly and intelligently. Otherwise there must be a presumption against it. From the record before us, we find that defendant's waiver is binding upon him. Defendant's petition on its face requests that counsel not be appointed for him and that petitioner desires to represent himself. This amounts to a waiver of his right to counsel. Moreover, it also was a declaration that petitioner wanted the right to represent himself, a right he most assuredly has.

Accordingly, we find that the trial court's dismissal of the petition should be affirmed. The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

SMITH, P.J., and TRAPP, J., concur.



23 I.A. 539<sup>3D</sup>  
(24540-4M-9-70) 160-o

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE LELAND SIMKINS, \_\_\_\_\_ Presiding Judge

HONORABLE JAMES C. CRAVEN, \_\_\_\_\_ Judge

HONORABLE HAROLD R. CLARK, \_\_\_\_\_ Judge

Attest: ROBERT L. CONN, Clerk.

---

BE IT REMEMBERED, that to-wit: On the 6th day  
of November A. D. 1974, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:





FILED

NOV 6 1974

STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

Robert L. Conn, CLERK  
APPELLATE COURT 4TH DISTRICT

General No. 12407

Agenda No. 74-83

STATE BANK OF ARTHUR,	)	
	)	
Plaintiff-Appellee	)	Appeal from
	)	Circuit Court
v.	)	Moultrie County
	)	67-L-96 and
H. E. KENDALL, B. G. SENTEL,	)	67-L-97
and MAXINE SENTEL,	)	
	)	
Defendants-Appellants	)	

Mr. JUSTICE CLARK delivered the opinion of the court:

This is an appeal from the circuit court of Moultrie County. The trial court denied defendant-appellant's petition for relief under section 72 of the Civil Practice Act (Ill.Rev.Stat. 1971, ch. 110, ¶ 72) requesting that the trial court set aside the judgment entered on July 29, 1971 against defendants and in favor of plaintiff. This appeal arises out of litigation that culminated in this court in the case of State Bank of Arthur v. Sentel, 10 Ill. App.3d 86, 293 N.E.2d 444.

In that case the court set forth the facts relevant to that appeal and they are included herein as background.

"This is an appeal from a judgment in favor of State Bank of Arthur entered against B. G. Sentel and H. E. Kendall on promissory notes executed by them



and a cross appeal by the State Bank of Arthur of the dismissal of the suit against Maxine Sentel.

"Two separate judgments by confession were obtained, the first on a promissory note for \$60,000.00 dated February 23, 1966 and signed by B. G. Sentel and Maxine Sentel and the second, upon a promissory note of the same date and amount signed by H. E. Kendall. After the judgments by confession were opened, the suits were consolidated for subsequent proceedings. Answers were filed to the complaints admitting the execution of the notes but denying liability under the notes and asserting three affirmative defenses: (1) the failure of consideration; (2) alteration of the notes, and (3) fraud in the execution. After the trial of the case, a motion was filed to amend and add a fourth affirmative defense that the notes were an accommodation to the State Bank of Arthur. The court allowed a motion to strike this last affirmative defense and entered judgment on the notes against H. E. Kendall and B. G. Sentel, and this appeal was taken. Judgment was not entered against Maxine Sentel on the note executed by her as the court found no consideration was given. The Bank cross-appeals that ruling.

"The factual background of this suit is complicated and at the trial contradictory testimony was introduced concerning the various issues. Both Doctor Kendall and Mr. Sentel were involved in the development of a medical facility near the Shelbyville reservoir. The enterprise was originally known as Merkl Development, Inc. and Kendall was the President of the corporation during various times of its existence and Sentel was its Secretary. (Subsequently, a second corporation was formed named Medical Park of the Kaskaskia, and two-thirds of its stock was owned by Merkl.) In connection with the development and promotion of these enterprises, the State Bank of Arthur took at various times a number of promissory notes from Merkl which were either guaranteed or endorsed by the Kendalls, Sentels and another person for a total of approximately \$121,000.00 as of September of 1965. At that time both Mr. Sentel and Doctor Kendall were shareholders and were officers of the corporation.

"In September of 1965, the three defendants and Violet Kendall executed promissory notes to the Bank of Decatur in the amount of \$121,727.55, the



proceeds of which were used to pay off the indebtedness of Merkl at the State Bank of Arthur. On December 16, 1965, the State Bank of Arthur received two new notes, one from the Sentels for \$60,000.00 and one from Doctor Kendall for \$60,000.00. The proceeds from these notes were used to pay off the National Bank of Decatur. These notes fell due on February 23, 1966 and were renewed by notes for sixty days. They were not paid when due. As a result, the aforesaid judgments were obtained against both the Sentels and Kendall. Included therein in the judgments obtained were interest, attorneys fees and costs.

"The issues raised by this appeal are whether the trial court erred in finding consideration for the notes and that there was no alteration and no fraud in the execution of the notes by Mr. Sentel and Doctor Kendall. An issue is also raised as to the striking of the alleged affirmative defense of alteration. As to the cross-appeal, the issue is whether there was consideration given for the note by Maxine Sentel."

This court's mandate in the original case, issued on March 1, 1973, affirmed the judgments in favor of the plaintiff against Sentel and Kendall, and the judgment in favor of defendant Maxine Sentel against the plaintiff was reversed. On April 11, 1973 the appellants filed their petition for relief under section 72 accompanied by several supporting affidavits and a copy of the note in question.

The petition alleged in part as follows:

"(3) That on or about March 2, 1973 the original Note which is represented by Plaintiff's Exhibit 9 in this cause, a copy of which is attached hereto labeled Exhibit A and incorporated herein by reference, came into the possession and attention of the Defendant, H. E. Kendall.



"(4) That said Original of Plaintiff's Exhibit 9, which is a certain promissory note for \$60,000.00 at six percent per annum interest for a period of sixty days dated December 16, 1965 and bearing Serial Number 20266 and bearing the purported signature of the Defendant, H. E. Kendall, was first seen by the Defendant, H. E. Kendall, on or about March 2, 1973, and that he never had an opportunity to examine said note or his signature prior to that date although many demands were made by him personally and through his attorneys on the Plaintiff, THE STATE BANK OF ARTHUR, to produce the original note for him to examine.

"(5) That the original note referred to above purportedly signed by H. E. Kendall, is a forgery as shown by the Affidavit of H. E. Kendall, Defendant above, attached hereto and incorporated herein by reference. The fact his purported signature thereon is a forgery is further shown by the Affidavit of one, JEAN DREW, who is a Questioned Document Expert, which Affidavit is attached hereto and incorporated herein by reference.

"(6) That because said note is a forgery, there is no consideration for the note which the Plaintiff took judgment on in this lawsuit against H. E. Kendall. The entry of Judgment on the note which the Plaintiff took judgment on against H. E. Kendall, which note was given as purported payment upon the renewal of Plaintiff's Exhibit Number 9 amounts to a fraud upon this Court since the Final Judgment in this Court is based upon a forged instrument.

"(7) That a grave injustice has been committed upon this Defendant, H. E. Kendall, because the Judgment of this Court is based upon a forged instrument and for the above and foregoing reasons amounts to a fraud upon this Court which is one of the reasons that this Court can grant these Defendants relief under Section 72 of Chapter 110, Illinois Revised Statutes."

The plaintiff-appellee, State Bank of Arthur, filed a motion to dismiss the petition and averred in part that defendants' petition failed to allege sufficient facts for relief under





section 72 of the Civil Practice Act; that no relief is available under section 72 by reason of newly discovered evidence; that the defendants are attempting to retry the lawsuit on a new theory of defense; and that even if the newly discovered evidence had been presented in the original proceedings, the outcome of the litigation would not have been changed; that defendant-appellants' petition and affidavit state that the note upon which the section 72 action is predicated was in the possession of defendants or their attorneys, and as a consequence said note was not available at trial due to negligence, inadvertence, or lack of due diligence on the part of defendants or their attorneys.

A hearing was held on the petition for section 72 relief and on the motion to dismiss petition. The trial judge ordered that the defendants' petition for relief under section 72 be denied. The order included the following findings:

"(1) That the allegations contained in the Defendants' Petition for Relief under Section 72 of Chapter 110 of the Illinois Revised Statutes are insufficient to show diligence on the part of the Defendants.

"(2) That assuming arguendo that the facts alleged in the Defendants' Petition for Relief under Section 72 of Chapter 110 of the Illinois Revised Statutes are true, the alleged facts would be insufficient to change the outcome of the case.

"(3) That the issues are with the Plaintiff, and the Plaintiff's Motion to Dismiss Petition for Relief Under Section 72 of Chapter 110 of the Illinois Revised Statutes should be granted."



The appellants urge that their petition should be allowed in that it states grounds for relief that would necessitate the trial court setting aside the judgment in the original litigation. They further contend that said judgment was based upon a forged instrument that was represented by plaintiff-appellee herein to be a valid instrument containing the signature of appellant Kendall; and that furthermore if the impropriety of the note in question had been brought forth at the original trial, the court would not have entered judgment for the appellee. Appellants state that the affidavits of Doctor Kendall and Jane Drew, a handwriting expert, assert that the note in question is not authentic, but is forged. Appellants submit that the case of The Sargent Company v. Baublis, 127 Ill.App. 631 is dispositive.

The appellee essentially argues that the appellants' petition merely alleges that they came across newly-discovered evidence that they had in their possession at the time of trial, and that the only reason this evidence was not presented was due to the negligence or lack of due diligence on the part of appellants.

Section 72 of the Civil Practice Act was enacted to provide one simple but comprehensive procedure by which a litigant may seek relief from a final judgment after 30 days. It supplants the common law writs of coram nobis, coram vobis, audita querela, and the chancery bills of review and bills in the nature of bills of review. Section 72 substitutes a simple remedy by petition enabling a party to bring before the court which rendered the judgment matters of



fact which, if known to the court at the time the judgment was entered, would have prevented its rendition. The petition under section 72 invokes the equitable powers of the court to avoid unfair, unjust, or unconscionable enforcement of a judgment or decree; but is not available to relieve a party from the consequences of his own mistakes or negligence or from the delinquencies of counsel. The petition may call to the attention of the court certain errors of fact about which the judgment was silent, inconsistencies in the record, mistakes by the clerk, absence or illness of counsel, fraud by opposing counsel, perjured testimony and many other reasons. Joint Committee Comments, Historical and Practice Notes, S.H.A., ch. 110, § 72.

To be entitled to redress under section 72, the petitioner must establish not only that adequate grounds for relief exist but that through no fault or neglect of his own, the error of fact or the existence of a valid defense was not produced at the trial. It is clear that a section 72 petition is not intended to relieve a party from the consequences of his own mistake or negligence. People v. Bracey, 51 Ill.2d 514, 238 N.E.2d 685; Skach v. Lydon, 16 Ill.App.3d 610, 306 N.E.2d 482.

As a general proposition the discovery of new evidence in and of itself is not sufficient basis for the granting of section 72 relief. (Schuman v. Department of Revenue, 38 Ill.2d 571, 232 N.E.2d 732.) The court in the Schuman case noted that the purpose of a motion under section 72 was to bring before the court rendering a



judgment matters of fact not appearing of record which if known at the time the judgment was rendered would have prevented its rendition; and that newly-discovered evidence in and of itself did not amount to facts not of record, which if known, would have prevented the rendition of the judgment.

The trial judge's order stated that appellants' petition failed to establish that they exercised due diligence, and that the alleged facts in the petition would be insufficient to change the outcome of the litigation. The rule is clear that to justify setting aside a judgment based on facts alleged in a petition, it must be shown that the new matter was not known to the moving party at the time of trial, and could not have been discovered by him with the exercise of reasonable diligence. It was pointed out in appellee's brief that the appellants had possession of the note in question throughout the proceedings and they could have produced it if they chose to do so, or if they had exercised due diligence in attempting to find the note.

In Johnson v. Hawkins, 4 Ill.App.3d 29, 280 N.E.2d 291, this court held that relief under section 72 of the Civil Practice Act is discretionary with the trial court. It is granted only upon a showing of due diligence, and the remedy is not designed to relieve a party from his own neglect. As a general rule, since considerable discretion is vested in the trial court which hears the petition for section 72 relief, an appellate court will only reverse upon a clear showing of abuse of discretion. City of Des Plaines v. Scientific





Mach. Movers, Inc., 9 Ill.App.3d 438, 292 N.E.2d 149.

The trial court sat as a finder of fact and law in the original proceeding, as well as in the hearing on appellants' motion for section 72 relief. From the record before this court, we find that the trial court did not abuse its discretion in denying the appellants' petition for section 72 relief. .

For the foregoing reasons, the order of the trial court denying appellants' petition for section 72 relief is affirmed.

ORDER AFFIRMED.

SIMKINS, P.J., and CRAVEN, J., concur.





59023

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court of Cook County.
v.	)	
	)	
JAMES HYMAN,	)	
	)	Hon. James M. Bailey,
Defendant-Appellant.)	)	Judge Presiding.

BEFORE McNAMARA, P.J., DEMPSEY and MEJDA, JJ.

PER CURIAM:

James Hyman, defendant, was found guilty after a jury trial of the crime of robbery (Ill.Rev.Stat. 1971, ch. 38, par. 18-1). He was sentenced to a term of 6 to 18 years. Defendant appeals, arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt because there was no evidence of the use of force or intimidation.

At trial, Bernard Horwitch, age 80, testified that on July 10, 1971, at 11:00 A.M., he was on the Halsted Street bus southbound at 79th Street. When the bus stopped, Horwitch got out of his seat and started to walk toward the door. He was suddenly surrounded by the defendant and two other men who blocked his exit. One of the men held Horwitch's arm, while the second man put his hand around Horwitch's neck. Horwitch struggled to get free but could not move. The three men took Horwitch's wallet containing two \$10 bills and one \$5 bill. The men then released Horwitch and got off the bus. As Horwitch was getting off the bus, he told the bus driver that he had been robbed. The bus driver helped Horwitch across the street where a police officer had the three men in custody.



Philip Ivory Wood, a bus driver for the CTA, testified that on July 10, 1971, he was driving a bus on which Bernard Horwitch was a passenger. He observed Horwitch being surrounded by three men at the rear of the bus. Thereafter, Horwitch informed Wood that he had been robbed by the three men. Wood testified that at this time he saw the three men walking in front of the bus. He observed a police car next to the bus and yelled to the officer that the three men had just robbed a passenger on the bus. Wood testified that he then helped Horwitch across the street to where the police officer had the three men in custody.

William Lieber, a Chicago police officer, testified that on July 10, 1971, at 11:00 A.M., he was in his patrol car stopped next to a CTA bus at a red light at 79th and Halsted, Chicago, Illinois. The bus driver informed him that the three men who were walking in front of the squad car had just robbed a passenger on the bus. Officer Lieber testified that after calling for assistance he got out of his car, drew his revolver and ordered the three men to halt. He observed the defendant drop a wallet, which was subsequently identified by Mr. Horwitch as the one taken from his person. A search of the defendant revealed two \$10 bills and one \$5 bill.

James Hyman, defendant, testified that on July 10, 1971, at 10:00 A.M., he was riding alone on the Halsted Street bus southbound at 79th Street. While on the bus, Horwitch asked if he had seen anybody take Horwitch's wallet. He told Horwitch that he had not. Defendant testified that he got off the bus and



while crossing 79th Street a police officer drew a pistol and ordered him to halt. Defendant denied robbing Horwitch and denied dropping a wallet to the ground when the officer ordered him to halt.

In rebuttal, the State presented certified copies of defendant's prior convictions; Indictment 58-514, burglary; Indictment 64-726, unlawful possession of a narcotic drug; and Indictment 70-2355, unlawful possession of a narcotic drug.

Defendant's only contention on appeal is that the evidence was insufficient to establish his guilt beyond a reasonable doubt because there is no evidence of the use of force or intimidation. Defendant was convicted of robbery, which is defined as the taking of "property from the person or presence of another by use of force or by threatening the imminent use of force" (Ill.Rev.Stat. 1971, ch. 38, par. 18-1). The use of force or intimidation is the crux of the charge of robbery and distinguishes it from theft. People v. Howell (1973), 11 Ill. App.3d 391, 296 N.E.2d 760.

In the case at bar, the evidence established that as Horwitch attempted to get off the CTA bus he was surrounded by the defendant and two other men. One of the men grabbed Horwitch's arm and a second man put his arm around Horwitch's neck. Horwitch attempted to get free but could not move. The three men took Horwitch's wallet and got off the bus. The three men were arrested within minutes by a police officer who happened to be upon the scene. When the officer ordered the defendant to halt, he dropped a wallet, which was subsequently identified as the one





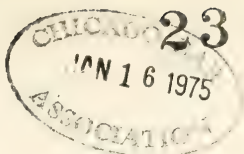
taken from Horwitch. A search of the defendant revealed money in the exact denominations that had been taken from Horwitch. The acts of the three men in surrounding Horwitch and physically restraining him by holding his arm and neck while they took his wallet were sufficient for the trier of fact to conclude that the men took property from Horwitch's person through the use of force. People v. Mosley (1968), 100 Ill.App.2d 361, 241 N.E.2d 476.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.



Nos. 60046  
60047



30  
23 I.A. 666

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court of Cook County.
v.	)	
	)	
KERMIT PARKER and JESSE BAILEY,	)	Honorable David Cerda,
	)	Presiding.
Defendants-Appellants.)	)	

BEFORE McNAMARA, PJ., DEMPSEY and MEJDA, JJ.

PER CURIAM:

The defendants, Kermit Parker and Jesse Bailey, were convicted, following a bench trial held on November 20, 1973, of the November 19, 1973 theft, of ten shirts valued at \$72, the property of Montgomery Ward & Co., in violation of Ill.Rev.Stat. 1973, ch. 38, par. 16-1(a)(1), and each was sentenced to six months to the Cook County Department of Corrections. The sole contention on appeal is that the defendants were not proved guilty beyond a reasonable doubt because the only witness for the State was unsure which of the two defendants wore a moustache.

The complaining witness, who testified she had been a security agent for Montgomery Ward & Co. for 17 years, positively identified both defendants at trial. She had an unobstructed view of both defendants for six minutes, observing them enter the store, observing them approach a shirt counter, observing Parker remove an empty shopping bag from under his coat while Bailey removed the shirts from the counter and placed them in the shopping bag. The defendants were apprehended outside the store.

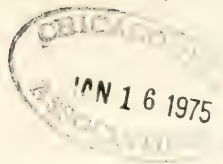
It is settled that precise accuracy in describing facial characteristics is unnecessary where an identification is positive, as it was here. People v. Catlett (1971), 48 Ill.2d 56, 63, 268



N.E.2d 378; People v. Camp (1972), 9 Ill.App.3d 445, 446, 292 N.E.2d 242. The complaining witness' testimony at trial was positive and credible and took place only one day after the offense. She testified she thought one of the defendants had a moustache and one a scar, but she was unsure which of the two had these characteristics. We have determined that no error of law appears, that an opinion would have no precedential value and that the evidence is not so unsatisfactory as to leave a reasonable doubt as to defendants' guilt. Accordingly, the judgment of the circuit court of Cook County is affirmed in accordance with Supreme Court Rule 23. Ill.Rev.Stat. 1973, ch. 110A, par. 23.

JUDGMENT AFFIRMED.





No. 60080

JAMES J. REAGAN,	)	
	)	
Plaintiff-Appellant,	)	APPEAL FROM THE CIRCUIT
	)	
v.	)	COURT OF COOK COUNTY.
	)	
A. S. KRISOR, et al.,	)	Hon. Francis F. Delaney,
	)	Presiding.
Defendant-Appellee.	)	

MR. PRESIDING JUSTICE McNAMARA delivered the opinion of the court:

Plaintiff, an attorney, appeals from an order of the circuit court of Cook County which under section 41 of the Civil Practice Act (Ill.Rev.Stat. 1973, ch.110,par.41) awarded compensation to defendants in the amount of \$500.00. The basis of the trial court's award was that plaintiff's complaint contained untrue allegations made without reasonable cause and not in good faith with respect to two of the named defendants, National Boulevard Bank of Chicago and Chicago Title and Trust Company.

On appeal plaintiff does not contest the propriety of an award under section 41, but argues that the award of \$500 is excessive because the defendants were compensated for expenses incurred subsequent to April 23, 1973, the date the two defendants filed their section 41 petition and the date plaintiff filed a motion for voluntary dismissal of both defendants in question. The plaintiff's right to a voluntary dismissal without prejudice prior to trial is absolute, and the court has no discretion to deny plaintiff's motion for a dismissal in such a case. (Gilbert-Hodgman, Inc. v. Chi. Thoroughbred Ent. (1974), 17 Ill.App.3d 460, 308 N.E.2d 164.) The record reveals that at least a portion of the \$500.00 awarded to defendants represented compensation for several appearances in court subsequent to April 23, 1973.

Since the plaintiff's pleadings in the present action contained statements that were untrue, made without reasonable cause and not in good faith, we find that, under section 41, the trial court properly awarded the defendants compensation which





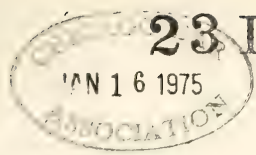
they actually incurred by reason of the untrue pleadings. However, plaintiff's motion for dismissal rendered additional court appearances for these defendants unnecessary. Since the award in part represented compensation for court appearances made subsequent to plaintiff's motion for a voluntary dismissal, we deem the award to be excessive. Under Supreme Court Rule 366, this court may, in its discretion, make any further order and grant any relief which the case may require. (Ill.Rev.Stat. 1973, ch.110A, par.366(a)(5); Cf. Goble v. Central Sec. Mut. Ins. Co. (1970), 125 Ill.App.2d 298, 260 N.E.2d 860.) Rather than remand this cause for further time-consuming and costly hearings as to the amounts of fees and expenses to be awarded, in light of the record before us, we are of the opinion that the award of such fees and expenses should be set in the amount of \$250.00.

Accordingly, the amount of the award is hereby set at \$250.00 and, as modified, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed as modified.

DEMPSEY and MEJDA, JJ., concur.





3D  
23 I.A. 668

58758

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
vs.	)	
	)	HON. DANIEL J. WHITE,
MICHAEL SMITH,	)	Presiding
	)	
Defendant-Appellant.	)	

PER CURIAM (FIRST DISTRICT, FIRST DIVISION):  
Before EGAN, P.J., BURKE and GOLDBERG, JJ.

Defendant, Michael Smith, was charged with the theft of \$120 United States currency from Walter Speedy in violation of Chapter 38, Section 16-1(a)(1). (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1).) After a bench trial, he was found guilty and sentenced to four months in the House of Correction. Defendant appeals, contending: (1) the complaint is fatally defective for failure to state an essential element; (2) defendant was not proved guilty beyond a reasonable doubt because the identification was doubtful and uncertain; (3) defendant was denied due process because the identification procedure was highly suggestive; (4) defendant was denied a fair trial and due process because of the admission of highly prejudicial irrelevant evidence; and (5) defendant's sentence was excessive.

The complainant testified that on Sunday, October 29, 1972, at 7:00 o'clock in the evening, as he was walking along Garfield toward Halsted in Chicago, he saw three people in front of him coming across Halsted. The street lights were on and there was other artificial lighting from a gas station on the corner. The three approached him; one (not the defendant) had a gun



which he pulled out as they neared the witness and told him to turn around and walk. The three walked defendant about 20 feet, one on each side and the one with the gun behind him. As defendant had approached the complainant, he was on the complainant's left; after the latter turned around, defendant was on complainant's right. After the three had stopped complainant, the little one (Boyd) took \$120 from complainant's pocket and all three then ran away. The entire incident took four to five minutes. Shortly after the incident, complainant described all three to the police. He said the defendant was about six feet, maybe 5'9", with a medium brown complexion and wearing a brown or beige jacket; he couldn't tell defendant's weight, but he told them defendant wasn't heavy. The next evening in the police station he saw defendant with two other boys; he also identified one of the other two.

Defendant, his mother and sister-in-law testified that defendant was at home at the time of the incident.

Defendant contends that the complaint was fatally defective in that it omits the word "permanently." However, an examination of the record shows that before trial the complaint was amended on its face by the addition of the word "permanently." As amended, it was sufficient to charge defendant with the crime of theft under Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1).

Defendant next argues that he was not proved guilty beyond a reasonable doubt because his identification by the complainant was unworthy of belief and was the result of an improper highly suggestive show-up. Defendant attacks his identification



on the ground that the complaining witness did not have a sufficient opportunity to observe the defendant whom he had never seen before.

The identification of a defendant by a single witness is sufficient to convict if the testimony is positive and the witness is credible, even though it may be contradicted by the defendant. (People v. Camp, 9 Ill. App. 3d 445, 292 N.E.2d 242; People v. McVet, 7 Ill. App. 3d 381, 287 N.E.2d 479; People v. Day, 2 Ill. App. 3d 811, 277 N.E.2d 745.) In a bench trial, it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where the evidence is so unsatisfactory as to leave a reasonable doubt of the defendant's guilt will the finding of the trial judge be disturbed. People v. Catlett, 48 Ill. 2d 56, 268 N.E.2d 378; People v. Gaiter, 8 Ill. App. 3d 784, 291 N.E.2d 172; People v. Wright, 10 Ill. App. 3d 1035, 295 N.E.2d 510.

Complainant observed defendant for four or five minutes in a well-lighted area. Complainant's testimony was positive. Its credibility and the weight to be given it were for the trial judge. The evidence was sufficient to establish defendant's guilt beyond a reasonable doubt.

Nor does the introduction of alibi testimony that defendant was at home at the time change the rule. An identification by one eyewitness to a crime is sufficient to justify a conviction if positive and credible, even though the defendant asserts an alibi defense. People v. Jackson, 54 Ill. 2d 143, 295 N.E.2d 462; People v. Bennett, 9 Ill. App. 3d 1021, 293 N.E.2d 687.





Defendant also argues that he was the victim of a highly suggestive show-up which caused his mistaken identification. He states that there was no line-up. This statement is unsupported by any evidence in the record. Further, defendant made no motion to suppress the identification testimony. Consequently, it was not necessary for the State to present evidence as to the circumstances of the identification made by the complaining witness. Failure to raise the question of the pretrial identification procedures waives the right to question them on appeal. (People v. Black, 52 Ill. 2d 544, 288 N.E.2d 376.) The question has not been preserved for review.

In addition, the in-court identification was positive and had an independent basis, untainted by any suggestive procedure. The complaining witness testified that he saw the defendant as the latter approached and walked alongside him for four to five minutes under good lighting. For that reason it does not fall within the "plain error" doctrine.

Defendant claims that he was denied a fair trial because prejudicial and irrelevant evidence was introduced.

Three boys were involved in the theft. The complaining witness identified two of them at the police station and testified that the third, not the defendant, took his money. The latter's name was Boyd. On cross-examination defendant testified that James Boyd was his brother, was present at home on October 29th at about 6 to 7 o'clock and was coming in and out. Defendant didn't know whether James left the house at some point; defendant wasn't watching him all the time.



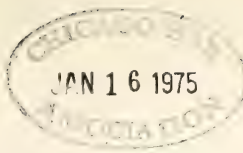
Defendant claims that this evidence prejudiced him before the judge in that it implied guilt by association with the actual perpetration of the theft. There is no merit to this contention because the State was entitled to inquire as to who was present at the time of defendant's alibi. Defendant was not wrongfully prejudiced; but even if the admission of the testimony was error, it was harmless because in a bench trial the trial judge is presumed to recognize incompetent evidence and disregard it. (People v. Clarke, 50 Ill. 2d 104, 108; 277 N.E.2d 866, 869.) There is nothing in the record that would overcome this presumption.

Defendant finally contends that his four-month sentence was excessive because he was a first offender. While an appellate court has the power to reduce sentences, it should be exercised with considerable caution and circumspection, since the trial judge has a superior opportunity during the trial and the hearing in aggravation and mitigation to determine the proper sentence. (People v. Taylor, 33 Ill. 2d 417, 211 N.E.2d 673; People v. Keene, 1 Ill. App. 3d 720, 274 N.E.2d 130.) The sentence here was within the standards of the applicable statutes and is consistent with the concept of rehabilitation. An examination of the record shows that the trial judge did not abuse his discretion.

The judgment is affirmed.

JUDGMENT AFFIRMED





3D  
23 I.A. 678

59767

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
	)	
vs.	)	
	)	
LARRY KIZER,	)	HON. GEORGE A. HIGGINS,
	)	Presiding.
Defendant-Appellant.	)	

PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Before Egan, P. J., Burke and Goldberg, J. J.

Larry Kizer, defendant, was found guilty after a bench trial of the crime of theft in violation of section 16-1(a) (1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a) (1).) He was sentenced to a term of 60 days in the House of Correction.

Defendant wished to appeal and the public defender of Cook County was appointed to represent him. After examining the record, the public defender has filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U. S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396, a brief in support of the motion has also been filed. The brief in effect concludes that an appeal in this case would be wholly frivolous and without merit. Defendant was mailed copies of the motion and brief on July 25, 1974. He was informed that he had until September 9, 1974, to file any additional points he might choose in support of his appeal. He has not responded.

The motion and brief of the public defender allege that the only argument which could be raised on appeal is that the defendant did not knowingly and understandingly waive his right to a trial by jury. The record demonstrates that when defendant's case was called, the following colloquy occurred between the trial



judge and privately retained defense counsel in defendant's presence:

"THE COURT: Waiver of jury?

DEFENSE ATTORNEY: Yes, Your Honor.

THE COURT: Trial by this Court?

DEFENSE ATTORNEY: Yes, Your Honor.

THE COURT: Please proceed."

There is no specific formula for determining whether a defendant understandingly and knowingly waived his right to a trial by jury. (People v. Richardson, 32 Ill. 2d 497, 207 N.E. 2d 453.) Each case depends upon the particular facts and circumstances of that case. (People v. Wesley, 30 Ill. 2d 131, 195 N.E.2d 708.) A lengthy explanation of the consequences of a jury waiver is not a prerequisite to the validity of that waiver. People v. Bradley, 131 Ill. App. 2d 91, 266 N.E.2d 469.

In People v. Punyko, 9 Ill. App. 3d 1052, 293 N.E.2d 672, the defendant argued that he did not knowingly and understandingly waive his right to a trial by jury. The record demonstrated that prior to trial, the trial judge asked: "You wish to waive your right to a trial by jury, submit the cause to trial by this court?" Defense counsel responded "That's correct." This court held that there was a valid jury waiver. See also People v. Kaprelian, 6 Ill. App. 3d 1066, 286 N.E.2d 613.

In the case at bar, defense counsel's response to the trial judge's questions regarding a waiver to the right to a trial by jury and trial by the court effectively waived defendant's right to a jury trial. Defendant, by not objecting to his privately retained counsel's statements made in his presence, is bound by his counsel's actions. People v. Sailor, 43 Ill. 2d 256, 253 N.E. 2d 397.





We have examined the record and concur in the opinion of the public defender that the argument thus raised does not have substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which are also not frivolous. Accordingly, the Public Defender of Cook County is granted leave to withdraw his counsel on appeal and the judgment of the circuit court of Cook County is affirmed.

MOTION ALLOWED, JUDGMENT AFFIRMED.

(Abstract Only).



JAN 16 1975

3D  
23 I.A. 685

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY.
	)	
v.	)	
	)	HONORABLE
THEOPHILUS GRAHAM,	)	ANTHONY J. BOSCO,
	)	PRESIDING.
Defendant-Appellant.	)	

\*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Theophilus Graham, defendant, was found guilty after a bench trial of the crime of unlawful use of weapons (Ill. Rev. Stat. 1973, ch. 38, par. 24-1(a)(4)). He was placed on probation for a period of six months.

Defendant wished to appeal and the Public Defender of Cook County was appointed to represent him. After examining the record, the Public Defender filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the motion has also been filed. The brief states that the only possible arguments which could be raised on appeal are that defendant's motion to suppress was improperly denied and that the evidence was insufficient to establish beyond a reasonable doubt that the weapon was concealed. The brief concludes that an appeal on these issues would be wholly frivolous and without merit. Defendant was mailed copies of the motion and brief on June 21, 1974. He was informed that he had until September 11, 1974, to file any additional points he might choose in support of his appeal. He has not responded.

The first possible argument which could be raised on appeal is that defendant's motion to suppress was improperly denied. At the hearing on the motion to suppress, Chicago Police Officer Rumowski testified that on November 25, 1973, he observed the defendant driving a vehicle with a rear license plate which was

\*GOLDBERG, J. took no part.



bent and unreadable. He stopped defendant's vehicle for that traffic violation. As Officer Rumowski stood next to the defendant outside the driver's side of the vehicle, he looked into the car and observed what appeared to be the butt portion of a gun protruding out from underneath the center armrest. He recovered the gun and placed the defendant under arrest.

Officer Rumowski's testimony was sufficient to establish that defendant was initially stopped for a minor traffic violation. Thereafter, Officer Rumowski's observation as he stood outside defendant's vehicle of what appeared to be the butt of a gun protruding out from under the center armrest established probable cause for Officer Rumowski's entry into defendant's vehicle to secure evidence of the offense. People v. Zazzetti, 6 Ill. App. 3d 858, 286 N.E. 2d 745.

The second possible argument which could be raised on appeal is that the evidence was insufficient to establish beyond a reasonable doubt that the weapon was concealed. Section 24-1(a)(4) of the Criminal Code requires (Ill.Rev.Stat. 1973, ch. 38, par. 24-1(a)(4)) that the weapon be concealed. However, the statute does not require that the firearm be carried in such a manner as to give absolutely no notice of its presence. It merely requires that the firearm be concealed from ordinary observation. People v. Colson, 14 Ill. App. 3d 375, 302 N.E. 2d 409; People v. Zazzetti, 6 Ill. App. 3d 858, 286 N.E. 2d 745, People v. Latson, 5 Ill. App. 3d 1100, 284 N.E. 2d 436.

In the case at bar, Officer Rumowski testified that he did not observe the gun until after he had approached defendant's car and was standing directly outside the driver's door of the vehicle. At that time he looked into the vehicle and observed a portion of what he believed to be the butt of a gun protruding from underneath the center armrest. This testimony was sufficient to establish that the weapon was concealed.

We have examined the record and concur in the opinion of



the Public Defender that the arguments thus raised do not have substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which are also not frivolous. Accordingly, the Public Defender of Cook County is granted leave to withdraw as counsel on appeal and the judgment of the circuit court of Cook County is affirmed.

Motion allowed;  
Judgment affirmed.





No. 59731



3D  
23 I.A. 704

PEOPLE OF THE STATE OF ILLINOIS,  
Respondent-Appellee,

) APPEAL FROM THE  
) CIRCUIT COURT OF  
) COOK COUNTY

v.

) HONORABLE  
) JOSEPH A. POWER,  
) JUDGE PRESIDING.

DANIEL DOYAL,  
Petitioner-Appellant.

PER CURIAM:

Before Hayes, P.J., Stamos and Downing, JJ.

Daniel Doyal, hereinafter called petitioner, appeals from the dismissal, without an evidentiary hearing, of his post-conviction petition, filed pursuant to the Illinois Post-Conviction Hearing Act (Ill. Rev. Stat. 1971, ch. 38, pars. 122-1 et seq.). The sole issue on appeal is whether the trial court properly dismissed the post-conviction petition without an evidentiary hearing.

In February, 1973, the petitioner, while incarcerated in the Federal Penitentiary at Leavenworth, Kansas, filed a post-conviction petition in the circuit court of Cook County alleging that on 16 separate occasions he was sentenced to and confined in the Cook County Jail or the Cook County House of Correction as a result of misdemeanor convictions "without benefit of counsel." The petition alleged that the numerous convictions began on September 27, 1950, and ended on April 29, 1954. The petition further alleged that on various occasions between September 25, 1957 and October 2, 1958, the petitioner was "arrested and held" without being informed of his constitutional rights; that on September 28, 1968, he was arrested and held without being informed of his constitutional rights; and that on March 6, 1959, he was sentenced and confined to the penitentiary to serve a sentence of 10 to 12 years, at which time he did not have the service and advice of counsel<sup>1/</sup>. The

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<sup>1/</sup> On this appeal, petitioner's sole contention relates solely to the misdemeanor convictions. Hence, any possible issue on appeal relating to this single alleged felony conviction has been waived.



petitioner prayed that all convictions be vacated and be declared null and void.

The petitioner's sole contention on this appeal is that he clearly set forth a constitutional issue by claiming that on numerous occasions he was incarcerated for misdemeanor convictions obtained through proceedings in which he was denied the benefit of counsel.

The petitioner concedes that the issue in the case at bar is controlled by the decision in People v. Warr (1973), 54 Ill. 2d 487, 298 N.E.2d 164. The petitioner states:

"The only substantial obstacles in the path to a hearing are the time limitations delineated in People v. Warr, supra at 493. According to these limitations, a petition must be brought within four months of final judgment on the guilty plea and within six months on final judgment following a trial. The last conviction enumerated in the pleadings occurred fifteen years before the petition was filed. (C. 6).

"The petitioner contends, however, that the temporal restrictions on actions, delineated in Warr, govern only pleadings presented subsequent to the date of the opinion. The instant petition was filed on February 9, 1973 four months before the opinion in Warr was announced on June 25, (C. 6)."

This argument is contrary to the decision in People v. Warr, supra, where the court said at page 493:

"With these considerations in mind, we direct, in the exercise of our supervisory jurisdiction, that until otherwise provided by rule of this court or by statute a defendant convicted of a misdemeanor who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his constitutional rights may institute a proceeding in the nature of a proceeding under the Post-Conviction Hearing Act. (Ill.Rev.Stat. 1971, ch. 38, pars. 122-1, 122-7). Such a proceeding shall be governed by the Post-Conviction Hearing Act except in the following respects:

- (1) the defendant need not be imprisoned;
- (2) the proceeding shall be commenced within 4 months after rendition of final judgment if judgment was entered upon a plea of guilty and within six months after the rendition of final judgment following a trial upon a plea of not guilty;
- (3) counsel need not be appointed to represent an indigent defendant if the trial judge, after examination of the petition, enters an order finding that the record



in the case, read in conjunction with the defendant's petition and the responsive pleading of the prosecution, if any, conclusively shows that the defendant is entitled to no relief." (Emphasis added.)

The petitioner concedes that the proceedings in the case at bar were not "commenced within 4 months after rendition of final judgment if judgment was rendered upon the plea of guilty and within six months after the rendition of final judgment following a trial upon the plea of not guilty."

The trial court and this court cannot change or modify the limitation provisions set forth in the Warr decision.

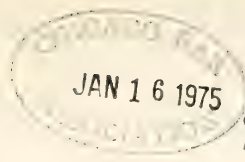
The judgment of the trial court is affirmed.

Judgment affirmed.

(Publish abstract only.)







30  
23 I.A. 730

60071

LaSALLE NATIONAL BANK as Trustee	)	
under Trust No. 41254,	)	
	)	APPEAL FROM
Plaintiff-Appellee,	)	
	)	CIRCUIT COURT,
	)	
v.	)	COOK COUNTY.
	)	
	)	Honorable Myron T. Gomberg,
WILLIAM H. DOGGETT, Jr., and GARY W.	)	Presiding.
LOGGINS,	)	
	)	
Defendants-Appellants.	)	

Mr. JUSTICE DIERINGER delivered the opinion of the court:

This action was brought in the Circuit Court of Cook County to confirm a judgment by confession which had been entered based on a failure of the defendants to pay rent under terms of the written lease. The trial court, sitting without a jury, entered judgment on behalf of the plaintiff for \$285.80.

The issues presented for review are whether the 5-day notice sent by the landlord to the tenants, stating that the lease would be terminated if the rent was not paid, had the effect of terminating the tenants' continuing obligation to pay rent under the lease, and whether Section 8 of the Landlord and Tenant Act denies due process of law if it is applied in a manner which misleads the tenant.

The appellee has not filed an appearance or brief in accordance with Supreme Court Rules, and in such circumstance this court may determine the case on its merits or, in its sound discretion, reverse based on the failure of the appellee to comply with the Supreme Court Rules. People ex rel. Pullman Bank & Trust Co. v. Fitzgerald, (1973) 14 Ill. App. 3d 247; Shinn v. County Board of School Trustees, (1970) 130 Ill. App. 2d 908; Woodward v. Woodward, (1968) 96 Ill. App. 2d 251.

In view of the fact the appellee has abandoned its case, we see no reason to go into the merits. Therefore, the case is reversed pro forma.

The judgment of the Circuit Court of Cook County is reversed.

REVERSED.

ADESKO, P.J., and JOHNSON, J., concur.

Abstract only.





CO BAR  
JAN 16 1975

59424

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
	)	
	)	
v.	)	_____
	)	
DANIEL J. WILHITE,	)	HONORABLE
	)	LOUIS B. GARRIPO,
Defendant-Appellant.	)	JUDGE PRESIDING.

PER CURIAM, First District, Fifth Division.

Before Barrett, Drucker and Lorenz, JJ.

Defendant was found guilty after a bench trial of the crime of delivery of a controlled substance. (Ill.Rev.Stat. 1971, ch. 56 1/2, par. 1401(b).) He was sentenced to a term of one to five years. Defendant appeals arguing that the delay of five months between the crime and his arrest deprived him of due process of law.

At trial, Ronald Schlobohm, a Chicago police officer, testified that on November 30, 1971, he was working as an undercover narcotics officer. He was under the surveillance of his partners, Chicago Police Officers Bernard Brown and Richard McKelvey. At approximately 10:30 A.M. he was in the vicinity of Belle Plaine (4100 North) and Broadway, Chicago, Illinois when he was approached by the defendant (known as "Don"), who offered to sell him two balloons for \$100. Defendant handed him a green balloon and a yellow balloon and he gave the defendant \$100. Officer Schlobohm described a balloon as a piece of cellophane containing heroin. Officer Schlobohm testified that he had worked the same area as an undercover officer for ten months previously, but had seen the defendant on only one previous occasion. After making the purchase, Officer Schlobohm went to a pre-arranged location to meet his partners. He gave the balloons to Officer Brown, who



performed a field test which proved positive for heroin. Officer Schlobohm testified that he waited four or five days to arrest the defendant so he would not destroy his cover. He further testified that he and his partners looked for the defendant on many occasions but they were not able to locate him until April 26, 1972, at which time he was placed under arrest.

It was stipulated that Chicago Police Officer Schlobohm gave the two balloons, which were purchased from the defendant, to Investigators Hanrahan and McKelvey, who transported the balloons to the Chicago Police Department Crime Laboratory. Chicago police chemist, Robert Boese, analyzed the balloons and tests proved that they contained: Packet 1, .62 grams of heroin; Packet 2, .67 grams of heroin.

Richard McKelvey, a Chicago police investigator, was called by the defense and testified that on November 30, 1971, at approximately 10:30 A.M., he heard the transaction between Officer Schlobohm and the man known as "Don." He testified that between November 30, 1971, and April 26, 1972, he made several unsuccessful attempts to find and arrest the defendant. On April 26, 1972, he arrested the defendant on the street at 4000 North Broadway, Chicago, Illinois. On cross-examination, Investigator McKelvey testified that at the preliminary hearing he mistakenly testified that the incident occurred at 10:30 P.M.

Defendant testified that from November 30, 1971, to April 26, 1972, he lived at 824 West Agatite, Chicago, Illinois. Defendant stated that he did not at any time leave the City of Chicago during that period. Defendant testified that he did not remember where he was on November 30, 1971, at 10:30 A.M.



OPINION

Defendant's only argument on appeal is that the delay of five months between the incident and his arrest denied him due process of law and prejudiced him in his ability to present a defense. The courts of this state have recognized that a delay between the incident and the arrest of a defendant can be so prejudicial as to violate a defendant's constitutional rights. (People v. Love, 39 Ill.2d 436, 235 N.E.2d 819.) However, a delay such as that in the case at bar will not invoke a presumption of prejudice. Each case must be examined on its particular facts and circumstances to determine whether the delay was so prejudicial to the defendant as to be violative of due process. People v. Jennings, 11 Ill.App.3d 940, 298 N.E.2d 409.

In People v. Palmer, 47 Ill.2d 289, 265 N.E.2d 627, defendant was convicted of selling a narcotic drug. The evidence adduced at trial demonstrated that at the time of the sale to an undercover police officer, the defendant was not placed under arrest because police officers were attempting to obtain convictions of other members of the narcotics ring. However, two days after the sale, upon the arrest of a relative of the defendant, the undercover police officer was recognized at the police station. The police then commenced a search for the defendant but were unable to locate him for a period of eight months. On appeal, defendant argued that the eight month delay between the date of the offense and the date of his arrest denied him due process of law and did not allow him effective assistance of counsel at trial. The Supreme Court rejected defendant's contention, holding:

"The delay in this case resulting from the failure of the police to locate the defendant was not the type of purposeful delay which would constitute denial of due process."



In the case at bar, Chicago Police Officer Schlobohm testified that the defendant was not placed under arrest immediately after the sale because Officer Schlobohm was working as an undercover police officer and did not want his cover destroyed. Four or five days after the sale, the police officers began to search for the defendant to place him under arrest. Officer Schlobohm and Investigator McKelvey testified that on numerous occasions they attempted to locate the defendant. Investigator McKelvey placed the defendant under arrest on April 26, 1972. Defendant now argues that the testimony of the police officers was insufficient to show that they were making a reasonable good faith effort to place him under arrest. We disagree. We cannot say that the pre-arrest delay in this case was caused by the State. There is no evidence in the record that the police officers knew the address of the defendant and Officer Schlobohm testified that whereas he worked the area as an undercover officer for 10 months previous to the date of his buy from the defendant, he had only seen the defendant on one prior occasion.

It is well established that in a bench trial, it is the function of the trial judge, as trier of fact, to determine the credibility of witnesses and the weight to be given to their testimony and only where the evidence is so unsatisfactory as to leave a reasonable doubt as to the defendant's guilt will the findings of the trial judge be reversed. (People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385.) After a review of the entire record, we conclude that the delay of five months between the date of the incident and the time when the defendant was placed under arrest did not constitute a denial of due process.

In accordance with the foregoing, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

PUBLISH ABSTRACT ONLY.







59964

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
BIRDELLA SMITH,	)	HONORABLE
	)	PAUL F. GARRITY,
Defendant-Appellant.)		PRESIDING.

Per Curiam: First District, Fifth Division.

Before Sullivan, P.J., Drucker and Lorenz, JJ.

Defendant was found guilty after a bench trial of the offense of battery in violation of Section 12-3 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 12-3).<sup>\*</sup> She was fined \$53 plus court costs. Defendant appeals arguing that the evidence was insufficient to establish beyond a reasonable doubt that she caused bodily harm to the complainant, a Chicago police officer.

At trial Daniel Drake, a Chicago police officer, testified for the State that on October 21, 1973, he and his partner, Officer Berry, were on routine patrol in the area of 1400 East 103rd Street, Chicago, Illinois, when they observed defendant driving a Triumph convertible automobile at an excessive rate of speed. After clocking defendant's speed, they put on their Mars light and siren. Defendant stopped her vehicle and got out. Both officers approached defendant's car. Officer Berry informed defendant that she had committed a traffic violation and asked to see her driver's license. Defendant flashed a license, which was inside her wallet, at the officers but refused to give it to them. Defendant used profanity and told the officers that she did not have to give them anything. Defendant then got back into her vehicle, the motor of which was

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<sup>\*</sup> Section 12-3 BATTERY

"(a) A person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual."



still running. Officer Drake reached into the car to pull the keys out of the ignition, and defendant punched him on the right side of his face with her fist. Officer Berry grabbed defendant's arm, removed her from the vehicle and handcuffed her. As the officers attempted to put defendant into the squadrol, she turned and kicked Officer Berry in the chest.

Benjamin Berry, a Chicago police officer, testified for the State that on October 21, 1973, he and his partner, Officer Drake, were on routine patrol in the area of 1400 East 103rd Street when they observed defendant driving a Triumph automobile at an excessive rate of speed. After clocking defendant's speed, they turned on their Mars light and siren to stop the vehicle. Defendant stopped her vehicle and got out. Both officers approached defendant's vehicle, and Officer Berry informed defendant that she was speeding. He asked defendant to produce her driver's license. Defendant waved her wallet but refused to produce a driver's license. She used profanity to the officers. Defendant then got back into her car, the motor of which was still running. Officer Berry testified that he opened defendant's car door, and Officer Drake reached into the car to remove the keys from the ignition. At this time defendant struck Officer Drake in the face. Officer Berry testified that he grabbed defendant's arm, removed her from the vehicle and handcuffed her. When the officers attempted to put defendant into a squadrol, she turned and kicked Officer Berry in the chest.

Defendant testified that on October 21, 1973, she was operating a 1972 Triumph Spitfire when she was stopped by Chicago police officers Berry and Drake; that she asked why she had been stopped, and the officers informed her that they did not have to tell her anything. Defendant stated that at the officers' request she produced her driver's license, but the officers never took the



license. When the officers failed to inform her why she had been stopped, she requested that they call a sergeant or somebody with whom she could communicate. She then told the officers that she was going to get into her car and wait for them to call a sergeant. When she entered her car, one officer twisted her left arm while the second officer removed the keys from the ignition. The officers forced her out of the car and handcuffed her. Defendant denied that she ever punched Officer Drake in the face or kicked Officer Berry in the chest.

### Opinion

Defendant's only argument on appeal is that the evidence is insufficient to establish beyond a reasonable doubt that she caused bodily harm to Officer Drake. The complaint charged that the defendant had committed the offense of battery in that she "knowingly and intentionally caused bodily harm without legal justification in that she struck complainant [Officer Drake] in face with fist." To establish that there has been bodily harm, there is no requirement that the evidence demonstrate a visible injury such as bruising, scratching or bleeding. (People v. Lowe, 12 Ill. App.3d 959, 299 N.E.2d 341.) The question of whether or not bodily harm has been established by the evidence is a question for the trier of fact to determine, and his determination will not be reversed unless the evidence is so unsatisfactory as to raise a reasonable doubt as to the defendant's guilt. People v. Tripp, 19 Ill. App.3d 200, 311 N.E.2d 168; People v. Garrett, 11 Ill. App. 3d 142, 296 N.E.2d 44.

In People v. Claudio, 13 Ill. App.3d 537, 300 N.E.2d 791, defendant was convicted of battery. The evidence adduced at trial demonstrated that defendant was seen causing a disturbance on the street. As police officers attempted to arrest defendant, he kicked the officers. The officers testified that they did not





sustain any injuries as a result of defendant's actions. On appeal defendant argued that the evidence was insufficient to demonstrate that the officers suffered any bodily harm. This court rejected that contention holding:

"It seems self-evident that the kicking of the police officers is in and of itself the causing of bodily harm and, therefore, the charge of battery against the defendant was proved beyond a reasonable doubt."

In the case at bar the testimony of Chicago police officers Drake and Berry established that on October 21, 1973, defendant, while driving a sports car, was stopped for a traffic violation. As the officers approached, defendant got out of her vehicle. The officers asked defendant to produce a driver's license, and she refused. Defendant then reentered her vehicle, the motor of which was running. When Officer Drake reached into the car and attempted to remove the keys from the ignition, defendant struck him in the face with her fist.

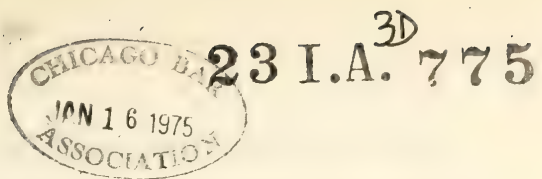
Under the facts presented by this record, the court could reasonably infer that Officer Drake suffered bodily harm when he was punched by defendant. We cannot find that the evidence is so unsatisfactory as to raise a reasonable doubt of defendant's guilt. The judgment is affirmed.

AFFIRMED.

Abstract only.







PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.	)	
	)	HONORABLE BENJAMIN NOVOSELSKY,
RICKY DAVIS,	)	Presiding.
	)	
Defendant-Appellant.)	)	

BEFORE HAYES, PJ., STAMOS and DOWNING, JJ.

PER CURIAM:

Ricky Davis, defendant, was found guilty after a bench trial of the crime of battery (Ill. Rev. Stat. 1973, ch. 38, par. 12-3). He was sentenced to a term of fifteen days in the House of Correction. Defendant appeals arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt and that he did not knowingly and intelligently waive his right to a trial by jury.

At trial, Eva Smith and the complainant, Erline Smith, testified that on July 1, 1973, shortly after midnight, they went to the Steak and Egger restaurant at 9550 S. Halsted, Chicago, Illinois with their brother, Speedy Smith. As they entered the restaurant, a group of boys, one of whom was the defendant, Ricky Davis, accosted Speedy and pushed him outside. When Eva Smith attempted to get the boys to leave Speedy alone, one of the boys began to hit her. Erline Smith came to the aid of Eva and the defendant hit Erline in the mouth. Erline Smith fell to the ground and defendant began to beat her. Speedy Smith pulled the defendant away. Erline Smith received fourteen stitches in her mouth.

Defendant testified that on July 1, 1973, he was at the Steak and Egger restaurant with his brother and sister. As he left the restaurant, Speedy Smith pushed him several times and a fight ensued. During the fight with Speedy, Erline Smith hit him in the face with



her shoe. Defendant testified that he grabbed Erline Smith but denied that he hit her. At this time, Eva Smith hit him with her shoe. Speedy Smith then proceeded to take a punch at him. Defendant testified that he ducked and Speedy hit Erline Smith in the face.

Defendant's first contention is that the evidence was insufficient to establish his guilt beyond a reasonable doubt. In a bench trial, it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where the evidence is so unsatisfactory as to raise a reasonable doubt of defendant's guilt will the findings of the trial judge be disturbed. People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385; People v. Pointer, 6 Ill.App.3d 113, 285 N.E.2d 171.

In the case at bar, Eva and Erline Smith testified that defendant, without justification, struck and kicked Erline Smith causing her bodily harm. The trial judge, after seeing and hearing all of the witnesses found their testimony sufficient to establish defendant's guilt on the charge of battery beyond a reasonable doubt. The testimony of the defendant does not create a reasonable doubt as to his guilt since the trial judge is not obliged to believe a defendant's testimony. (People v. Kaprelian, 6 Ill.App.3d 1066, 286 N.E.2d 613.) The failure of the State to call Speedy Smith as a witness at trial does not create an inference that his testimony would have been unfavorable to the prosecution. (People v. DeSavieu, 11 Ill.App.3d 529, 297 N.E.2d 336.) After a review of the record we conclude that the State's evidence was sufficient to establish defendant's guilt beyond a reasonable doubt.

Defendant contends that he did not knowingly and intelligently waive his right to a trial by jury. Defendant argues that the trial judge improperly allowed him to waive his right to a trial by jury when he was seventeen years of age and he was not represented by counsel in violation of Ill. Rev. Stat. 1973, ch.38, par. 113-5 which provides:



No person under the age of 18 years shall be permitted to plead guilty or waive trial by jury in any case except where the penalty is by fine only unless he is represented by counsel in open court.

The record reflects that at the time of trial, defendant was seventeen years of age. When defendant's case was called, the trial judge asked defendant if he wished a bench trial or a jury trial. Defendant stated that he wished a bench trial. Thereafter, in response to questioning by the trial judge, the defendant stated that he was unrepresented by counsel and could not afford counsel. The trial judge appointed the Public Defender to represent defendant and the case was passed for counsel to confer with his client. When the case was recalled the trial proceeded with no further mention of a jury waiver. The State in its brief concedes that under these circumstances, defendant's jury waiver was invalid. We concur with both parties that the jury waiver entered by defendant was invalid. For the limited purpose of determining the propriety of a remand for a new trial, we hold that the evidence adduced by the State at trial is sufficient to warrant our remand for a new trial. Accordingly, the judgment of the Circuit Court of Cook County is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

PUBLISH ABSTRACT ONLY.

10-15-71  
Zapier  
2nd Div.

23 I.A. 788<sup>3D</sup>

JAN 16 1975

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
	)	Appeal from the Circuit
	)	
v.	)	Court of Cook County.
	)	
	)	
LEWIS MCAFEE,	)	Frank J. Wilson, J.
	)	
Defendant-Appellant.	)	

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

A jury found the defendant Lewis McAfee guilty of murder, attempt murder, armed robbery and attempt robbery. He was sentenced to consecutive terms of one hundred to one hundred and fifty years in the penitentiary for the murder, ten to twenty years for the attempt murder, five to fifteen years for the armed robbery and five to ten years for the attempt armed robbery.

McAfee contends that he was not proven guilty beyond a reasonable doubt of the murder because the testimony of an accomplice was not sufficient evidence to support his conviction. He also contends that as a 17-year-old male he was denied equal protection of the law under section 2-7(1) of the Juvenile Court Act (Ill.Rev.Stat., 1969, ch. 37, para. 702-7(1)) — a protection which was afforded to females of the same age.

At his trial, McAfee admitted that he participated in the robbery of a grocery store and the attempt robbery of a laundromat, but said that he had nothing to do with the murder of Elisa Garcia,







a woman he and his companions encountered as they fled from the laundromat. One of these companions, Harvey Jackson, was the only witness who testified that McAfee shot Mrs. Garcia.

On December 17, 1969, McAfee, Jackson, Clifford Hardin, Charles Pickens and Joseph Daniels robbed a grocery store and then returned to Jackson's home and hid the stolen money in the basement. After a brief interval they left with the intention of holding up a nearby laundromat. McAfee, who was armed with a .22 calibre revolver, went in a side door and Pickens, who was also armed, entered the front door. The others waited outside. McAfee and Pickens tried to rob the attendant, and shot her during the attempt.

When Jackson, Hardin and Daniels heard the shots they started to run. McAfee caught up to the first two and ran with them toward Jackson's house. Jackson testified that when they got to the alley nearest his house, McAfee saw Elisa Garcia walking in the alley and yelled to the others to grab her purse. She screamed and McAfee told her to shut up; when she did not, he shot her three times. The youths then ran to Jackson's house. Jackson said he went directly to his basement but that McAfee went up to Jackson's bedroom on the second floor. When he came down to the basement, he told Jackson that he had hidden the gun in a clothes hamper.

Jackson admitted that his testimony differed from the story he had given to the police. In that story, he said that when McAfee called out for them to take Mrs. Garcia's purse, he and Hardin did



not stop, but ran past the woman so that they did not see McAfee shoot her. He said that although he had not told the truth when he gave the police that statement, he was telling the truth at the trial.

Chicago Police Officer James Lamb testified that when he arrived in the alley where Mrs. Garcia was shot, two small children pointed to the Jackson house as the place where the young men involved in the shooting had gone. He and several other police officers proceeded to the house and found McAfee, Jackson, Hardin, Pickens and Daniels hiding in the basement.

Officer John Gorman testified that he returned to the Jackson residence on the evening of December 17th after being told by Jackson that there was a gun hidden in the clothes hamper of his bedroom. Gorman stated that he recovered a .22 calibre revolver from the hamper. The gun was identified by Jackson as the one carried by McAfee. It was also identified by Samuel Torres, an employee of the grocery store robbed by the youths, who said it was in McAfee's possession during the robbery. The gun was admitted into evidence.

A police firearms expert, testified that bullets recovered from the body of Elisa Garcia were fired from the .22 calibre gun which was in evidence.

McAfee testified that he carried the .22 revolver during the robbery of the grocery store but that he gave the gun to Hardin before going to the laundromat. He said he acted as a look-out at the laundromat and ran back to Jackson's house with Jackson and Hardin.



He said he went into Jackson's house, but that Hardin ran past the house. He testified that he heard several shots while he was in Jackson's bedroom and a short while later, Hardin entered the room and hid the gun in the clothes hamper. He said they then went down to the basement where they were later discovered by the police. He said that Jackson's little brother pointed him out to the police as the one who had been carrying a gun.

The defendant maintains that the only evidence that he shot Mrs. Garcia was the testimony of Jackson, who was also charged with her murder, and that this testimony was discredited because it contradicted the statement Jackson made to the police about the shooting and because Jackson was an accomplice to the crime.

In People v. Hansen (1963), 28 Ill.2d 322, 192 N.E.2d 359, the court said that the testimony of an accomplice,

"...is not of the most satisfactory character and...it is attended with serious infirmities (such as malice toward the accused, promises or hopes of leniency, or the hope of benefits from the prosecution), which require the utmost caution in relying upon such testimony alone."

The court also stated that if the testimony of an accomplice is found to be credible, it is sufficient even without corroboration to sustain a conviction. The jury believed Jackson and his testimony alone was sufficient to establish McAfee's guilt. But Jackson's testimony was not the only evidence against the defendant. His own testimony corroborated Jackson in many respects. He admitted that



he possessed the murder weapon during the robbery of the grocery store and he himself testified that Jackson's little brother pointed to him as the one who had a gun when Elisa Garcia was shot.

The defendant's contention that he was denied equal protection of the law because of an unfair classification by sex has been answered in People v. McCalvin (1973), 55 Ill.2d 161, 302 N.E.2d 342. McCalvin interpreted former section 2-7(1) of the Juvenile Court Act which provided that for the purposes of criminal prosecutions, males seventeen years of age were adults but seventeen-year-old females were juveniles. The court held that under the Constitution of 1870, the statute did not deny equal protection. The offenses for which McAfee was convicted took place in 1969 and his contention is governed by the McCalvin decision.

McAfee's guilt was proven beyond a reasonable doubt and his conviction will be affirmed. The sentences imposed upon him, however, have been questioned in a supplemental brief which was filed with our permission.

The brief argues that he should be resentenced under section 5-8-4(b) of the Unified Code of Corrections (Ill.Rev.Stat., 1973, ch. 38, para. 1005-8-4(b)) which states:

"The court shall not impose a consecutive sentence unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that such a term is required to protect the public from further criminal conduct by the defendant, the basis for which the court may set forth in the record."





The sentencing provisions of the Unified Code of Corrections are applicable to defendants who have direct appeals pending. People v. Chupich (1973), 53 Ill.2d 572, 295 N.E.2d 1. These provisions apply, however, only if they call for a lesser sentence than that provided by the prior law under which the prosecution was commenced. Ill.Rev.Stat., 1973, ch. 38, para. 1008-2-4; People v. Killebrew (1973), 55 Ill.2d 337, 303 N.E.2d 377. The State contends that section 5-8-4(b) constitutes neither a sentencing provision nor one calling for a lesser sentence than that provided under prior law.

In People v. Talach (1974), 20 Ill.App.3d 794, 311 N.E.2d 319, the court considered the same argument and held that the provisions of the Code pertaining to consecutive sentences were ameliorative and less harsh than former law and were therefore applicable to the consecutive sentences given to the defendant in that case. We are in accord with that pronouncement. Section 5-8-4(b) adds tests that must be met by a trial court before it orders consecutive sentences, therefore the imposition of such sentences is more restricted. A defendant should be able to take advantage of the stricter standards which now prevail.

The application of section 5-8-4(b) has been considered in several cases. In People v. Reno (1974), 17 Ill.App.3d 348, 308 N.E.2d 3, the court changed the defendant's sentence from consecutive to concurrent after finding that the record "does not indicate



that a consecutive sentence is required to protect the public from further criminal conduct by the defendant." In People v. Talach, the court said that the cause should be remanded to the trial court for reconsideration of the sentence as the court could not say from the record whether a consecutive sentence was warranted. In People v. Scott (No. 58784, filed June 20, 1974) this court concluded that consecutive sentences were proper.

In one afternoon, McAfee robbed at gun point an employee of a grocery store, attempted to rob a laundromat, shot the defenseless attendant in the neck and shoulder and fired at and killed an innocent housewife who was reluctant to surrender her purse. When sentencing him, the trial court reviewed these offenses and said: "In my seven years as a judge, this is one of the worst cases that I have heard." The record would support the conclusion that the court considered one of the standards required by section 5-8-4(b) before the imposition of consecutive sentences, that of "having regard to the nature and circumstances of the offense." The record also indicates that the court satisfied the second standard regarding the "history and character of the defendant." Before pronouncing sentence the court stated:

"The court had a full hearing in aggravation and mitigation, and also has in front of it the presentence investigation prepared by the Cook County Adult Probation Department."



The record does not, however, directly satisfy (although it may inferentially) the third standard, that consecutive sentences shall not be imposed unless the court "is of the opinion that such a term is required to protect the public from further criminal conduct by the defendant." If the trial court was of this opinion it cannot be blamed for not having said so. McAfee committed his crimes in 1969 and he was tried, convicted and sentenced in 1971. The Unified Code of Corrections did not become effective until January 1, 1973. Section 5-8-4(b) was not the law when the court pronounced sentence and there was no reason for it to have anticipated future legislation.

The same section states that the court may set forth in the record the basis for its opinion that consecutive sentences are necessary to protect the public from further criminal conduct by the defendant. If the trial court was of this opinion, it would be helpful to this court, in the exercise of its discretion to reduce sentences, to know the reasons behind the opinion. Remandment for resentencing would give the trial court the opportunity to state in full the basis for its imposition of four consecutive sentences.

But the compelling reason for remandment is that sentences do not, in all instances, meet the standards of the Unified Code of Corrections. Ill.Rev.Stat., 1973, ch. 38, sec. 1001-1, et seq. For example, the aggregate minimum sentences do not comply with section 5-8-4(c) (Ill.Rev.Stat., 1973 Supp., ch. 38, para. 1005-8-4(c)).



Under People v. Chupich, the defendant may take advantage of this section which was the prevailing law during his appeal:

"The aggregate maximum of consecutive sentence shall not exceed twice the maximum term authorized under Section 5-8-1 for the most serious felony involved. The aggregate minimum period of consecutive sentences shall not exceed twice the lowest minimum term authorized under Section 5-8-1 for the most serious felony involved...."

The aggregate minimum period of the defendant's sentences is one hundred and twenty years. Under section 5-8-4(c), the aggregate minimum sentence cannot be more than twice the lowest minimum authorized under section 5-8-1 for the most serious felony involved, in this case murder. The lowest minimum sentence for murder is fourteen years. Ill.Rev.Stat., 1973, ch. 38, para. 1005-8-1(c)(1). Twice the minimum would be twenty-eight years.

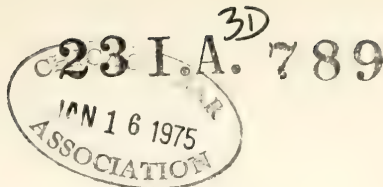
The judgment confirming the jury's verdict of guilty will be affirmed. The sentences will be vacated and the cause will be remanded for resentencing.

Affirmed and remanded.

McNamara, P.J., and Mejda, J., concur.







No. 59008

PEOPLE OF THE STATE OF ILLINOIS, )	APPEAL FROM THE
Plaintiff-Appellee, )	CIRCUIT COURT OF
vs. )	COOK COUNTY.
CHARLES STAPLES, )	HONORABLE
Defendant-Appellant. )	LAWRENCE I. GENESEN,
	PRESIDING.

Before McNAMARA, P.J., DEMPSEY and McGLOON, J.J.

PER CURIAM:

Following a bench trial, the defendant, Charles Staples was convicted, along with co-defendants Gregory King and David Plummer, of the theft of \$20 in cash and a portable television set from Ernest Sloan on December 29, 1972, in violation of Section 16-1 of the Criminal Code, and sentenced to seven months at the Illinois State Farm, at Vandalia. (Ill. Rev.Stat. 1971, ch.38, par.16-1.) On appeal, he contends that the evidence did not prove beyond a reasonable doubt, as required by section 5-2(c) of the Criminal Code, that he was accountable for the actions of King and Plummer, who, it is conceded, did rob Sloan. Ill.Rev.Stat. 1971, ch.38, par.5-2(c).

Ernest Sloan testified that on December 29, 1972, at about 3:30 or 4:00 in the afternoon, the defendant, whom he had known for a couple of months, entered his apartment at 2042 West Washburne Avenue in Chicago, said he was going out south and would not be back until the following evening at 7:00. Sloan asked the defendant to get him a drink and gave him some money whereupon the defendant left. Ten minutes later he heard footsteps and observed the two co-defendants, King and Plummer. King put a hunting knife about a foot long in Sloan's back, raised it and said, "Don't holler". King took \$20 from Sloan's wallet and Plummer took the television set. Somebody knocked on the door and within seconds King and Plummer ran out of the apartment and down the hallway; Sloan ran to the window and saw



the three defendants crossing the street "together". He observed that Staples was about three or four feet from the others, that all three men were running south and that Plummer was carrying the television set.

The defendant, Charles Staples, testified that he went to Sloan's apartment on December 29, 1972, and at Sloan's request agreed to purchase a half-pint of V.O., and took money from Sloan for that purpose. Upon his return five minutes later Sloan, who had been robbed, hollered downstairs for him to call the police. He then ran out the door and fell, breaking the whiskey bottle and saw two boys running with the television set. He ran after the two robbers, but didn't catch them. He was about 25 feet away from the two men, the two men were not the co-defendants, King and Plummer. When he returned to Sloan's house, Sloan locked the door and accused the defendant of setting him up to be robbed. The time was around 5:00 P.M. and it was dark outside.

Gregory King testified that he was not in the vicinity on December 29, 1972, that he knew the defendant Staples and saw him later that day at 10:00 or 11:00 in the evening and did not see Plummer that day.

David Plummer testified that he was not in the vicinity on December 29, 1972, and did not see Staples that day, but saw him the next day. He and Staples grew up together and he has also known King about a year and a half.

Ernest Sloan testified in rebuttal that Staples never came back to his apartment after the robbery, that he did not see or hear Staples after the robbery, that he did not tell Staples to call the police nor did Staples ask him why he should call the police. The witness did not tell Staples to chase the boys who had just taken his T.V. and money.



ch.38, par.5-2(c)) provides that a person is legally accountable for the conduct of another when: "(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." In People v. Kriston (1973) 12 Ill.App.3d 18, 23, 297 N.E.2d 206, cited by the defendant, the court stated that a finding of guilty on accountability principles under this section of the Criminal Code requires the prosecution to show beyond a reasonable doubt: "(1) that the defendant solicited, aided, abetted, agreed or attempted to aid another person in the planning or commission of the offense; (2) that his participation took place either before or during the commission of the offense; and (3) it must have been with the concurrent, specific intent to promote or facilitate the commission of the offense. People v. Tillman, 130 Ill. App.2d 743, 749, 750, 265 N.E.2d 904, 909."

The evidence here showed that Staples, whom Sloan knew, was in the apartment shortly prior to the commission of the offense. Sloan gave the defendant money with which to purchase something to drink, but the defendant never returned. Instead, within ten minutes, two other men, assisted by some third person who knocked on the door to indicate everything was clear, committed an armed robbery. After King and Plummer left in response to the knock on the door, Sloan went to his window, looked out and observed Plummer, who was carrying the television set, and King and the defendant running south together. He observed the defendant Staples only three or four feet away from the other men at this time. The conflicting testimony of Sloan and the defendant presented a question of credibility for the trier of fact to resolve. Defendant's position that he was an innocent bystander is inconsistent with the testimony of Sloan. Likewise, defendant's explanation that he was chasing the robbers when Sloan saw him is not convincing since



Sloan saw the defendant only 3 or 4 feet away from the others. Sloan's testimony supports the inference that it was the defendant who knocked on the door to give Plummer and King the all clear sign and who then fled with them. The trial court was justified in concluding that the defendant was a member of the team that committed the robbery. (Cf. People v. Lawrence (1971) 132 Ill.App.2d 512, 517, 270 N.E.2d 510.) Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.





No. 59254



PEOPLE OF THE STATE OF ILLINOIS, )  
 ) APPEAL FROM THE CIRCUIT  
Plaintiff-Appellee, )  
 ) COURT OF COOK COUNTY.  
v. )  
 ) HONORABLE  
LARRY O. CHALMERS, ) FRANK J. WILSON,  
 ) PRESIDING.  
Defendant-Appellant. )

Before McNAMARA, P.J., DEMPSEY and MEJDA, JJ.

PER CURIAM:

Larry O. Chalmers, defendant, was found guilty after a jury trial of the crime of armed robbery (Ill.Rev.Stat. 1971, ch.38, par.18-2). He was sentenced to a term of six to eighteen years. Defendant appeals, arguing that the prosecutor's closing argument was improper and that the trial court erroneously instructed the jury.

At trial, the victim, a student at the University of Chicago Law School, testified that on January 2, 1972, at approximately 8:30 p.m., she was alone approaching the vestibule of the apartment building located at 6107 South Kenwood, Chicago, Illinois, where she was to attend a party. As she walked up to the building, she observed a person she identified as the defendant and a second man walking toward her on the sidewalk. The men followed her into the vestibule of the building, where she rang the doorbell for entrance into the apartment area. She and the two men were followed into the vestibule by four other men. The vestibule was lighted with a naked light bulb overhead. Defendant asked her where she was going and she replied that she was going to a party and that they would not be able to attend since it was a small party. The men then asked what floor she was going to and she replied the third floor. As she proceeded up the stairs, the defendant and several of the men followed her and began to go through her pockets. The defendant produced a blue steel revolver and took her billfold, two credit cards and a set of keys.



The victim testified that in the middle of February, 1972, she received a statement from the Enco-Exxon Company stating that her credit card, which had been taken in the robbery, was used to purchase gasoline at a Standard Station on January 2, 1972. The license number of the vehicle stated on the invoice was PK 874. In May, 1972, she viewed a lineup and positively identified the defendant as one of the men who had robbed her.

A certified copy of the 1971 registration for State of Illinois license PK 874 was introduced into evidence. It showed that the vehicle was registered to one Stanley Hagler.

William Wagner, a Chicago police investigator, testified that he was assigned the investigation of this robbery on January 2, 1972. Pursuant to that investigation, he arrested the defendant on May 4, 1972. Defendant was transported to Area Two headquarters, where he was advised of his constitutional Miranda warnings. Thereafter, defendant stated that he was using Stanley Hagler's car while Stanley Hagler was in jail, which was in December, 1971 and January, 1972. In his statement to the police, defendant denied robbing the complaining witness.

Defendant's first contention is that the prosecutor's closing argument was improper. Defendant argues that three statements made by the prosecutor constitute an improper comment on his failure to testify.

Defendant first complains that the prosecutor stated to the jury that they had seen the complaining witness testify and could judge her credibility. This was a fair statement and in no way called the jury's attention to the fact that the defendant did not testify.

Secondly, defendant complains that the prosecutor stated that the jury did not know much about the defendant and all they could tell about him was a comment he had made to the complaining witness during the occurrence. Statements based on facts properly in evidence or on legitimate inferences therefrom are proper



comment in closing argument. (People v. Kent (1973), 15 Ill.App. 3d 523, 305 N.E.2d 42.) Here, the testimony of the complaining witness at trial demonstrated that during the robbery the defendant made several comments to her. These facts were in evidence and were therefore a proper subject of argument by the prosecutor. Even if the comment could be considered error, it was harmless.

Third, the defendant complains that the prosecutor stated that all of the State's evidence was un rebutted. It is permissible for a prosecutor to comment on the uncontradicted nature of the State's case, even where the only person who could have contradicted the State's evidence was the defendant himself. (People v. Smith (1973), 15 Ill.App.3d 10, 304 N.E.2d 50; People v. Hopkins (1972), 52 Ill.2d 1, 284 N.E.2d 283.) The prosecutor's comment was not improper and did not prejudice the defendant.

After a review of the entire closing argument, we conclude that it cannot be fairly said that the defendant was so substantially prejudiced that there is a reasonable possibility that the questionable language considered in light of all the evidence was a material factor in his conviction. People v. Nicholls (1969), 42 Ill.2d 91, 245 N.E.2d 771; People v. Smith (1972), 6 Ill.App.3d 259, 285 N.E. 2d 460.

In addition, the defendant at trial did not object to any of the three comments which he now alleges as error. His failure to object constitutes a waiver and defendant may not now argue that those comments were improper. People v. Donald (1963), 29 Ill.2d 283, 194 N.E.2d 227; People v. DeSavieu (1973), 11 Ill. App.3d 529, 297 N.E.2d 336.

Defendant's second contention is that the trial court erred in instructing the jury on the law regarding admissions. Defendant argues that the trial judge improperly gave IPI Criminal No. 3.06 when the evidence demonstrated that his statement to the police was not an admission. The State in its brief concedes that defendant's statement was not legally an admission, but urges



that the error in instructing the jury was harmless.

Not all errors committed in instructing a jury are prejudicial to a defendant. (People v. Stewart (1970), 46 Ill.2d 125, 262 N.E. 2d 911.) Where the evidence adduced at trial is overwhelming, error in instructing the jury may be deemed harmless. People v. Parks (1971), 133 Ill.App.2d 348, 273 N.E.2d 162.

In the case at bar, the evidence presented at trial was uncontradicted and overwhelming. The defendant's statement to the police officers was not legally an admission and the trial judge therefore improperly instructed the jury. However, after a careful review of the entire record we conclude that this error could not possibly have affected the verdict of the jury. The error was harmless beyond a reasonable doubt.

For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.







30  
23 I.A. 796

59371

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY
	)	
v.	)	
	)	
CURTIS STILLWELL,	)	HONORABLE
	)	HAROLD W. SULLIVAN,
Defendant-Appellant.	)	Presiding.

Mr. JUSTICE MEJDA delivered the opinion of the court.

Defendant, Curtis Stillwell, appeals from the sentence imposed after revocation of probation, contending that the sentence is excessive in that the trial court improperly considered the subsequent violations of probation in determining punishment, and that the sentence does not comply with the provisions of the Unified Code of Corrections (Ill. Rev. Stat. 1973, ch. 38, par. 1008-2-4).

On June 22, 1972, defendant waived indictment and entered a plea of guilty to an information charging him with robbery (Ill. Rev. Stat. 1971, ch. 38, par. 18-1). He was placed on probation for a period of three years with the conditions that he make restitution and enter the drug abuse program. Defendant was subsequently arrested and charged with committing the offenses of armed robbery, burglary and aggravated battery on October 9, 1972. He was bound over to the grand jury but was not prosecuted on the charge. On November 2, 1972, a hearing was held on a rule to show cause why defendant's probation should not be revoked. At the hearing, through the testimony of witnesses it was established by a preponderance of the evidence that on October 9, 1972, defendant, without authority, entered the apartment of Harold Powell who was not present, struck Raymond Powell (a brother



to Harold) with his fist, a candy dish and a lamp, causing substantial injuries. He also took a stereo, a ring and a radio from the apartment.

Defendant's probation was then revoked and a hearing was held in aggravation and mitigation, in which his prior record disclosed six misdemeanor convictions and a violation of a previous probation. In sentencing defendant to a term of 5 to 12 years in the penitentiary, the trial judge stated:

"But I think that I am going to sentence you to the penitentiary, to the Department of Corrections, for a minimum of five years and a maximum of twelve years. I think I am going to do that on the assumption that this might dispose of all of these matters. I don't know what the State's position would be. I think a lot could be said here but I don't think it would do any more good at this time after hearing all of the evidence I am convinced that this is what I am going to do, sir."

Defendant first contends that the sentence for violation of probation was excessive in that the trial judge improperly considered the subsequent acts which resulted in the violation of probation. He argues that the trial judge considered the gravity of the subsequent acts in fixing the sentence and also the great discrepancy between the sentence of three years' probation and that imposed upon revocation. The State responds that it was proper for the trial judge to take into account the subsequent crimes of defendant which were committed while he was on probation where those crimes bear a reasonable relation to defendant's potential for rehabilitation, which the court must assess in determining the appropriate sentence.

When probation has been violated, a trial judge may alter the conditions of probation or imprison the probationer for a term not to exceed the maximum penalty for the offense of which the probationer was convicted. (Ill. Rev. Stat. 1971, ch. 38, par. 117-3(d), 1972 Supp. ch. 38, par. 1005-6-4(e).)



A trial judge is charged by statute to take cognizance of all factors relevant to the rehabilitation potential prior to sentencing. When probation is revoked, the subsequent activities of the probationer can be considered, not in determining the severity of the punishment, but in determining the probationer's rehabilitation potential which directly affects the maximum sentence to be imposed. (People v. Coles (1974), 20 Ill. App. 3d 851, 314 N.E. 2d 526; People v. Clyne (1972), 7 Ill. App. 3d 121, 287 N.E. 2d 72; People v. Ford (1972), 4 Ill. App. 3d 291, 280 N.E. 2d 728; People v. Golston (1971), 1 Ill. App. 3d 132, 273 N.E. 2d 614.) Consistent with these recent cases, the punishment for any subsequent offense or alleged offense raised in a revocation hearing as grounds for revoking probation should be imposed only after conviction on such subsequent charge, and not by indirection in the sentence imposed for the original conviction upon a revocation of probation. (People v. Newton (1974), 18 Ill. App. 3d 180, 309 N.E. 2d 779.) In the instant case, the subsequent acts were not prosecuted.

We are not persuaded by defendant's argument that the disparity between the sentence imposed and the original three-year-probation sentence indicates that the trial judge was imposing punishment for other than the original offense upon which defendant was convicted. The sentence of 5 to 12 years is within the statutory limitations then in effect for the offense of robbery. (Ill. Rev. Stat. 1971, ch. 38, par. 18-1.) In light of defendant's previous criminal record, and the fact that he violated probation within four months, the sentence imposed cannot be said to be unreasonably harsh.

We do agree, however, that the statements made by the trial judge at the time of sentencing indicate that he improperly considered the subsequent acts in determining the sentence imposed, rather than limiting such consideration to defendant's



rehabilitation potential. The record reflects the statement of the trial judge that the sentence of 5 to 12 years was being imposed "on the assumption that this might dispose of all of these matters." We conclude that the statement is a strong indication that the judge looked beyond the original offense in determining the severity of the punishment and that we must resolve the question in defendant's favor. People v. Gilmore (1971), 133 Ill.App. 2d 377, 273 N.E. 2d 680.

Defendant's further contention that the sentence does not comply with the provisions of the Unified Code of Corrections is conceded by the State. This case has not reached final adjudication and the Code is applicable. (People v. Harvey (1973), 53 Ill. 2d 585, 294 N.E. 2d 269; Ill. Rev. Stat. 1973, ch. 38, par. 1008-2-4.) Robbery is now a Class-2 felony for which the minimum sentence cannot exceed one-third of the maximum imposed. (Ill. Rev. Stat. 1973, ch. 38, par. 18-1 and 1005-8-1(c)(3).) The State has suggested that this court reduce the minimum sentence of five years to four as authorized by Supreme Court Rule 615 (Ill. Rev. Stat. 1973, ch. 110A, par. 615(b)(4)). However, we express no opinion as to the appropriate sentence to be imposed, but instead, affirm the revocation of probation and remand the cause for resentencing. In such proceedings, the trial court should consider the defendant and his background, his prior criminal record, all of the factors in the original offense of robbery, and his subsequent conduct while on probation, the last only as it reflects on defendant's rehabilitation potential.

Accordingly, the judgment revoking probation is affirmed, the sentence vacated, and the cause remanded for further proceedings not inconsistent with the views expressed.

Judgment of revocation affirmed;  
remanded for resentencing.

McNAMARA, P.J., and DEMPSEY, J., concur.







PEOPLE OF THE STATE OF ILLINOIS, )	APPEAL FROM
)	CIRCUIT COURT
Plaintiff-Appellee, )	COOK COUNTY
)	
v. )	
)	
JOHN W. NARDUCY, )	HONORABLE
)	JACK A. WELFELD,
Defendant-Appellant. )	Presiding.

Before McNAMARA, P.J., DEMPSEY, J., and MEJDA, J.

PER CURIAM:

After a bench trial, defendant, John W. Narducy, was found guilty of the crime of resisting arrest (Ill. Rev. Stat. 1971, ch. 38, par. 31-1). He was placed on probation for a period of one year with the condition that he submit to treatment at the Chicago Board of Health Medical Center. He appeals, arguing that he was improperly denied pretrial discovery, pursuant to Supreme Court Rules 411 and 412 (Ill. Rev. Stat. 1971, ch. 110A, pars. 411 and 412), and that the trial court improperly denied his request for an arrest report made out by witnesses for purposes of impeachment.

At trial, Chicago Police Officers Richard F. Mitchell and Gerald Jackson testified that on November 14, 1972, at approximately 7:15 P.M., they parked their squad car in the City parking lot at 3535 South Halsted Street. As they walked north on Halsted, they observed the defendant standing in a doorway at 3527 South Halsted, yelling obscenities, with a crowd gathered around him. The officers approached and Officer Jackson informed defendant he was under arrest for disorderly conduct. Defendant began swinging at them, and during a scuffle he struck and kicked Officer Jackson. He was subdued and handcuffed, then taken to the police station where he continued to kick and shout obscenities to the officers.



Defendant testified that on November 14, 1973, he was in the Centaur Lounge at 3527 South Halsted Street, when he saw two girls walk by, and he went outside to talk to them. While standing on the sidewalk he observed Officers Mitchell and Jackson. He testified that as the officers passed by he called them pigs. Officer Jackson asked defendant if he had been drinking. As he tried to go back into the tavern Officer Jackson grabbed his arm and hit him in the face. The next thing he remembered he was lying on the sidewalk handcuffed to a parking meter. He testified that he was kicked by Officer Jackson and beaten with clubs by several other officers.

James Barnhart and James Kozla testified for the defense that when they arrived on the scene they observed the defendant lying on the ground handcuffed to a parking meter, and they saw Officer Jackson kick the defendant.

Defendant's first contention is that the trial court erred when it denied his pretrial motion for discovery. Prior to trial he filed an extensive ten-point motion for discovery pursuant to Supreme Court Rules 411 and 412 (Ill. Rev. Stat. 1971, ch. 110A, pars. 411 and 412). The State supplied defendant with a list of witnesses and stipulated that defendant had not made a confession. The trial judge denied the remainder of defendant's motion on the ground that Supreme Court Rules 411 and 412 applied only to felonies. Defendant now argues that Supreme Court Rules 411 and 412 apply to both felonies and misdemeanors. In the alternative, he argues that if the Supreme Court Rules do not apply to misdemeanors they are unconstitutional as a violation of equal protection and due process of law.



In People v. Schmidt (1974), 56 Ill. 2d 572, 309 N.E.2d 557, the Supreme Court rejected an identical argument. The court held that Supreme Court Rule 411 et seq., pertaining to discovery, applies only to felonies and not to misdemeanors. In addition, the court held that there is a reasonable distinction between felonies and misdemeanors which justifies the application of the rules only in felony cases.

In his reply brief defendant argues that even if this court were to hold that he was not entitled to pretrial discovery his pretrial motion included as point eight a request for a bill of particulars to which he was entitled under section 114-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 114-2). Point eight of defendant's pretrial motion for discovery asked for the date of the occurrence, if other than that specified in the complaint, and the place and time of the occurrence.

The purpose of a bill of particulars is to enable the defendant to prepare his defense. A motion for a bill of particulars is addressed to the sound discretion of the trial court, and it is only where a defendant cannot properly prepare his defense that the prosecution is required to furnish same. People v. Bain (1935), 359 Ill.455, 195 N.E. 42; People v. Gill (1970), 122 Ill.App. 2d 60, 257 N.E. 2d 115.

In the instant case the complaint filed against defendant alleged that the offense occurred on November 14, 1972, at 3527 South Halsted. The testimony of Officers Mitchell and Jackson established that the offense in fact occurred on that date at that location. As to the time, defendant was obviously in no way prejudiced since he produced two witnesses who were present during part of the occurrence. Under these



circumstances, we conclude that the trial judge did not abuse his discretion in denying point eight of defendant's discovery motion.

Defendant's second contention is that he was denied a fair trial when the trial judge denied his request for the arrest report prepared by a witness for purposes of impeachment. At trial, Officer Mitchell testified that on the evening of the incident an assault and battery case report and an arrest report were prepared. The assault and battery case report was furnished to defense counsel. Officer Mitchell testified that prior to trial he did not review the arrest report and did not have a copy of it. The Assistant State's Attorney stated that he had given defense counsel all the police reports in his possession.

On cross-examination, Officer Jackson testified that an assault and battery case report and an arrest report were prepared. He stated that he did not have a copy of the arrest report in his possession. Defense counsel made a motion to produce the arrest report, which motion was denied by the trial judge. Defendant now urges that the failure to produce the arrest report denied him a fair trial.

The State is required to furnish to the defendant on demand for purposes of impeachment specific statements in its possession made by a State's witness, which have been established to exist and which are in the witness' own words or substantially verbatim. (People v. Summers (1973), 12 Ill. App. 3d 893, 299 N.E. 2d 462.) In the case before us, the testimony of Officers Mitchell and Jackson established that although an arrest report was prepared they did not have a copy of it in their possession. The prosecutor stated that he had furnished to defense counsel all of the police reports he had in his file. Defense counsel was given a copy of the







assault and battery case report. Defendant has failed to show how he was in any way prejudiced as a result of being denied the arrest report. Under these circumstances the error, if any, in failing to supply defendant with a copy of the arrest report, was harmless.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.



JAN 16 1975

No. 59938

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellant,	)	
	)	COURT OF COOK COUNTY.
v.	)	
	)	HONORABLE
JEROME ZACHARIA,	)	KENNETH R. WENDT,
	)	PRESIDING.
Defendant-Appellee.	)	

MR. PRESIDING JUSTICE McNAMARA delivered the opinion of the court:

The State, pursuant to Supreme Court Rule 604(a)(1), appeals from an order of the circuit court of Cook County quashing a search warrant and suppressing evidence. The search warrant was originally issued to search the defendant, Jerome Zacharia, and certain premises for cocaine, possession of which constitutes the offense of possession of a controlled substance. At the preliminary hearing, defendant made a motion to quash the search warrant and suppress evidence on the basis that the reliability of the informer mentioned in the affidavit for a search warrant had not been established. The motion was denied. Defendant was subsequently indicted. Prior to trial, he again made a motion to quash the search warrant and suppress evidence on the same ground. The trial judge granted the motion, and the State appeals.

On appeal, the State contends that the affidavit for search warrant was sufficient to supply probable cause for the issuance of the search warrant, and that the trial judge could not relitigate a motion to quash a search warrant when it had already been raised and decided by a judge at a preliminary hearing.

Because of our view of the proceeding, it is necessary to discuss only the State's first contention.

The affidavit in support of the complaint for a search warrant stated as follows:

I, Edward Flynn, being a police officer for the City of Chicago, did have an occasion to have a conversation with a reliable informant whom I have known for the past nine months. During this period of time, this informant has given me information which has led to the arrest and recovery of contraband narcotics on three different occasions. In two of these incidents,



convictions have resulted, while the third case was a bond forfeiture. As a result of this most recent conversation which occurred on the 4th of February 1972 the informant stated to me that he had made a purchase of a quantity of cocaine from a male white known as Jerry Zacharia for a sum of \$25.00 in the residence located at 3529 No. Oconto St. This purchase occurred in the morning of 4 Feb. 1972 and the informant knew the quantity purchased to be cocaine from having used it in the past. The informant further stated that this Jerry Zacharia still had an additional quantity under his control after the purchase which occurred on the 4th of Feb. 72 at 3529 No. Oconto St.

In addition to Officer Flynn's signature, the document on its face bore the signature of Assistant State's Attorney James W. Reilly.

While, in the trial court, defendant attacked the sufficiency of the affidavit on the ground that the reliability of the informer had not been established, he now challenges the affidavit on several grounds. Defendant maintains that the affidavit failed to demonstrate that there was any reason to believe that contraband would be found in the premises to be searched since there was no allegation that defendant lived at or frequented the premises in question.

Applications for search warrants must be tested in a common sense and realistic fashion. (People v. McGrain (1967), 38 Ill.2d 189, 230 N.E.2d 699; People v. Levin (1973), 12 Ill.App.3d 879, 299 N.E. 2d 336.) In the present case, the affidavit in the complaint for search warrant stated that on the morning of February 4, 1972, the informant had purchased a quantity of cocaine from the defendant in the residence at 3529 N. Oconto Street. The informant further stated that when he left the apartment defendant had additional quantity of cocaine under his control. These allegations were sufficiently detailed so as to enable the issuing judge to reasonably determine that there was a quantity of cocaine in the apartment. (People v. Ranson (1972), 4 Ill.App.3d 953, 282 N.E. 2d 462.) Nor do we believe that the principle that an application for a search warrant must be tested in a common sense fashion should be ignored because an assistant State's Attorney has viewed and approved the application.



In our judgment, the affidavit demonstrated sufficiently that the informer was reliable. In People v. Cook (1971), 133 Ill. App.2d 335, 273 N.E.2d 261, this court found the informant to be reliable on the basis of an affidavit reciting that the informant had furnished information which led to one conviction, one complaint stricken with leave to reinstate, and a third case pending. In People v. Portis (1972), 4 Ill.App.3d 333, 280 N.E.2d 712, this court held the reliability of an informant was established on the basis of an affidavit which stated that the informant had given the police information in the past which had led to one conviction, two cases pending, and a case in which there had been a bond forfeiture.

In the present case, the police officer's affidavit stated that he had known the informant for the past nine months, and that the informant had given information which led to arrest and recovery of contraband on three separate occasions. In two of those incidents, convictions had resulted, and in the other case a bond forfeiture had taken place. These allegations were sufficient to establish the informant's reliability. The uncorroborated hearsay evidence of an informant will support a finding of probable cause for the issuance of a search warrant where there is a substantial basis for crediting the hearsay. People v. Mitchell (1970), 45 Ill.2d 148, 258 N.E.2d 345.

The affidavit in the present complaint for search warrant specified sufficiently how the informant knew the defendant still had a quantity of cocaine under his control. In People v. Ranson (1972), 4 Ill.App.3d 953, 282 N.E.2d 462, this court upheld a search warrant in which the police officer stated that a reliable informant had purchased a packet of heroin from the defendant and "when he (the informant) left the premises, there was still a portion of heroin in the possession and under the direct control of both persons named above." See also People v. Rivera (1970), 130 Ill.App.2d 321, 264 N.E.2d 699.







In the instant case the affidavit stated that the informant told the police that defendant still had an additional quantity of cocaine under his control after the purchase. This statement was sufficient to enable the issuing judge to ascertain how the informant acquired his information and to determine the probability that additional cocaine was still in the apartment. Similarly, the informant's statement that he knew the item purchased to be cocaine because he had used cocaine in the past, was sufficient to establish that a controlled substance was involved. People v. Portis, supra.

In the present case, the affidavit set forth that the police officer had received reliable information from a reliable informant. It detailed sufficient information to demonstrate that reliability. The affidavit then set forth the informant's statements revealing the underlying circumstances justifying a search. From the information contained, the issuing judge was clearly able to make an independent evaluation on the reliability of the informant and to reasonably conclude that there was contraband to be searched. (Aguilar v. Texas (1964), 378 U.S. 108; Spinelli v. United States (1969), 393 U.S. 410.) The complaint for search warrant demonstrated probable cause and the search warrant was properly issued.

For the reasons stated, the order of the circuit court quashing the search warrant and suppressing evidence is reversed, and the cause is remanded for further proceedings not inconsistent with the holdings of this opinion.

Order reversed and  
cause remanded.

DEMPSEY and MEJDA, JJ., concur.





59956 and 59957 (Consolidated)

PEOPLE OF THE STATE OF ILLINOIS, )	)	
	)	
Plaintiff-Appellant,)	)	Appeal from the Circuit
	)	Court of Cook County.
	)	
v. )	)	
	)	Honorable James E. Murphy
HENRY JOHNSON, )	)	Judge Presiding.
	)	
Defendant-Appellee. )	)	

BEFORE McNAMARA, P.J., DEMPSEY and MEJDA, JJ.

PER CURIAM:

Defendant, Henry Johnson, was charged with the unlawful possession of a controlled substance, marijuana, in violation of Section 4 of the Cannabis Control Act (Ill.Rev.Stat., 1973, ch. 56-1/2, par. 704). The trial court sustained defendant's motion to suppress the physical evidence. The People appeal pursuant to Supreme Court Rule 604(a)(1). Ill.Rev.Stat., 1973, ch. 110A, par. 604.

At the hearing of the defendant's motion to suppress, Police Officer Peter Neilson testified that on March 29, 1973, at approximately 3:00 A.M., he and his partner stopped defendant in the entrance of the alley east of Central Park Avenue on Jackson Boulevard, Chicago, Illinois. In answer to questions by defense counsel, Neilson testified that defendant did not make any attempt to run away and cooperated with Neilson; that subsequent to stopping defendant, he or his partner did not go



59956 and 59957 (Consolidated)

in the alley to retrieve something. Neilson said he retrieved the marijuana a few feet from defendant and that he did not know what was in the bag until after he stopped defendant.

The defense rested and the State moved to deny the motion. The motion was kept in abeyance and Neilson was cross-examined by the prosecutor. Neilson stated that defendant was walking south in an alley east of Central Park towards Jackson Boulevard. Neilson said he and his partner were in a marked vehicle and in uniform. When he first observed defendant about 70 to 90 feet away, defendant was carrying a large bag. As defendant approached the entrance to the alley, he dropped the bag between two parked vehicles, which partially concealed the bag from Neilson's view. At that time Neilson was about 20 to 30 feet from defendant. After defendant put down the bag, he continued walking south. Neilson attempted to ascertain defendant's reason for going in the alley at three o'clock in the morning, carrying a large bulky transparent acetate bag about two to three feet in diameter. Defendant told the officers he was on his way home.

At the point where the police officers were talking to defendant, they were within 10 to 20 feet of the bag. Neilson walked over to the bag, examined its contents and found it contained 32 bricks of marijuana and a brown paper bag containing a crushed green plant. The police officers then arrested defendant. The contents of the bag were inventoried with the Crime Laboratory and Neilson received a report with respect to the items.





On redirect examination, Neilson said he "stopped the man's liberty and progress and questioned him prior to knowing what was in the bag."

The trial court sustained the defendant's motion to suppress the physical evidence.

The facts in the case at bar are analogous to those in Terry v. Ohio (1967), 392 U.S. 1, 20 L.Ed.2d 889, 88 Sup. Ct. 1868, where the court said (392 U.S., pp. 22-23):

"Applying these principles to this case, we consider first the nature and extent of the governmental interests involved. One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. It was this legitimate investigative function Officer McFadden was discharging when he decided to approach petitioner and his companions. He had observed Terry, Chilton, and Katz go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation. There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away. It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further." (Emphasis added.)





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Also see People v. Naujokas (1974), 18 Ill.App.3d 278, 309 N.E.2d 743.

In the case at bar, as in the Terry case, the situation called for investigation where the defendant was walking down an alley at three o'clock in the morning carrying a large transparent acetate bag about two to three feet in diameter, which he dropped between two parked vehicles when he was approached by police officers. It would have been "poor police work indeed" for police officers "to have failed to investigate this behavior."

In light of the record, the police officers were justified in stopping the defendant to investigate further his behavior "even though there [was] no probable cause to make the arrest" (392 U.S., p. 22).

With the determination that the police officers were legally justified in stopping the defendant for investigative purposes, it necessarily follows that the police officer properly seized the bag containing the marijuana which was lying in plain view between two parked vehicles. The law is clear that there is no search involved when the seized article is in plain view. In People v. Sylvester (1969), 43 Ill.2d 325, 253 N.E.2d 429, the defendant contended that a bag containing marijuana was wrongfully picked up from the curb by the police at the time of his arrest and should have been suppressed as being the result of an unlawful search. In rejecting this argument, the court said (43 Ill.2d, pp. 327-328):

"In our judgment determination of the validity of the arrest is irrelevant as are the arguments relating to the reasonableness of a search, for in this case



no 'search' ever occurred. As we have often stated: 'A search implies a prying into hidden places for that which is concealed, and it is not a search to observe that which is open to view.' (People v. Davis, 33 Ill.2d 134, 138, and cases there cited; People v. McCracken, 30 Ill.2d 425, 429; see, also, People v. Cummings, 38 Ill.2d 11, 13; People v. Hanna, 42 Ill.2d 323; People v. Jackson, 98 Ill.App.2d 238.) No such conduct occurred here. The bag was sitting in plain and open view on the sidewalk curb where it had been abandoned by defendant, and its seizure by the officers under these circumstances in no way violated any constitutional rights of defendant. People v. Martinez, 257 Cal.App.2d 270, 64 Cal. Rptr. 666; United States v. Clark (W.D. Pa.), 294 Fed.Supp. 1108."

Also see People v. Bridges (1970), 123 Ill.App.2d 58, 259 N.E.2d 626.

Likewise, in the case at bar there was no search of defendant. The bag was sitting in plain and open view between two vehicles where it had been dropped by defendant. Its seizure by the police officers under these circumstances in no way violated any constitutional rights of defendant. The trial court erred when it sustained defendant's motion to suppress the physical evidence.

The judgment of the trial court is reversed and the cause remanded for further proceedings not inconsistent with the opinion of this Court.

JUDGMENT REVERSED,  
CAUSE REMANDED.

Third Division



JAN 16 1975

No. 59992

PEOPLE OF THE STATE OF ILLINOIS, )  
 ) APPEAL FROM THE CIRCUIT  
 Plaintiff-Appellee, )  
 ) COURT OF COOK COUNTY.  
 v. )  
 ) HONORABLE  
 JAMES WOODIN, ) EARL E. STRAYHORN,  
 ) PRESIDING.  
 Defendant-Appellant. )

Before McNAMARA, P.J., DEMPSEY and MEJDA, JJ.

PER CURIAM:

James Woodin, defendant, was found guilty after a bench trial of the crime of robbery (Ill.Rev.Stat. 1971, ch.38, par. 18-1). He was sentenced to a term of four to twelve years.

Defendant wished to appeal and the Public Defender of Cook County was appointed to represent him. After examining the record, the Public Defender filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California (1967), 386 U.S. 738, a brief in support of the motion has also been filed. The brief states that the only possible arguments which could be raised on appeal are that the defendant did not knowingly and understandingly waive his right to a trial by jury and that the identification testimony was insufficient to establish his guilt beyond a reasonable doubt. The brief concludes that an appeal on these issues would be wholly frivolous and without merit. Defendant was mailed copies of the motion and brief on June 24, 1974. He was informed that he had until September 15, 1974, to file any additional points he might choose in support of his appeal. He has not responded.

The first possible argument that could be raised on appeal is that the defendant did not knowingly and understandingly waive his right to a trial by jury. The record demonstrates that when defendant's case was called the trial judge inquired of defense counsel if it was going to be a bench or a jury trial. Defense counsel, in defendant's presence, responded that it would be a bench trial. Thereafter, the trial judge personally advised



the defendant that he had a constitutional right to a trial by jury of twelve people. Defendant stated that he wished to have a bench trial. The trial judge also advised the defendant that by signing a jury waiver he would waive his constitutional right to a trial by jury. Thereafter defendant signed a jury waiver, which was tendered to the trial court.

Here, defense counsel's statement made in defendant's presence that it would be a bench trial, standing alone, could be considered sufficient to constitute a valid jury waiver. (People v. Sailor (1969), 43 Ill.2d 256, 253 N.E.2d 397; People v. Kaprelian (1972), 6 Ill.App.3d 1066, 286 N.E.2d 613.) In addition, the record reflects that the trial judge carefully admonished the defendant of his constitutional right to a jury trial. Defendant stated that he wanted a bench trial. The trial judge advised defendant that by signing a jury waiver he would waive his right to a trial by jury. Thereafter, defendant signed a jury waiver which was submitted to the trial court. Under these circumstances we conclude that defendant knowingly and understandingly waived his right to a trial by jury. People v. Johnson (1971), 3 Ill.App.3d 158, 279 N.E.2d 47.

The second possible argument which could be raised on appeal is that the identification testimony was insufficient to establish defendant's guilt beyond a reasonable doubt. At trial, Edward Bahannon testified that on July 13, 1972, at approximately 11:30 p.m., he was driving home from work. As he stopped his car at the intersection of 139th and Western, he was approached by the defendant and a second man. Defendant produced a gun, put it up against Bahannon's neck, and threatened Bahannon's life. Both men entered the car and forced Bahannon to drive to the playground area of a school where they robbed Bahannon of \$46. Bahannon testified that during the robbery he was able to view the defendant's face on several occasions. Approximately one week after the robbery, Bahannon identified defendant's photograph from a group of fifteen which he viewed.





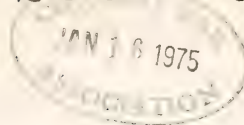


In a bench trial it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where the evidence is so unsatisfactory as to raise a reasonable doubt of a defendant's guilt will the findings of the trial judge be disturbed. (People v. Clark (1972), 52 Ill.2d 374, 288 N.E.2d 363.) The testimony of a single witness, if positive and credible, is sufficient to sustain a conviction even though contradicted by the defendant. (People v. Bennett (1973), 9 Ill.App.3d 1021, 293 N.E.2d 687.) In the case at bar, the testimony of Bahannon was positive, credible and sufficient to establish defendant's guilt beyond a reasonable doubt.

We have examined the record and concur in the opinion of the Public Defender that the arguments thus raised do not have substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal. Accordingly, the Public Defender of Cook County is granted leave to withdraw as counsel on appeal and the judgment of the circuit court of Cook County is affirmed.

Motion allowed;  
Judgment affirmed.





59039

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
	)	
vs.	)	
	)	
ROBERT BRADY,	)	HON. MAURICE POMPEY,
	)	Presiding.
Defendant-Appellant.	)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

A complaint was filed in the circuit court of Cook County, municipal division, charging Robert Brady (defendant) with theft of a Goodyear automobile tire of the value of less than \$150. (Ill. Rev. Stat. 1971, ch. 38, par. 16-1.) After a bench trial, he was found guilty and sentenced to ten months in the prison farm at Vandalia. In his appeal he contends that the State failed to establish beyond a reasonable doubt that the allegedly stolen property actually belonged to the complaining witness and that the State failed to prove venue. The People respond that the evidence proved beyond a reasonable doubt the ownership of the stolen tire and that venue was proved beyond doubt.

The evidence showed that the arresting officer received a radio call after which he proceeded to "1113 West 63rd Street" in a poorly lit area. He saw two automobiles parked back to back with four males about them. One person, later identified as defendant, was holding a wheel of one car and turning a lug wrench. When the police approached, defendant dropped the wrench and ran. He was found hiding underneath an abandoned truck some 15 feet away and arrested. His hands and clothes were dirty. The owners of both automobiles, a man and a woman, were present at trial.

The arresting officer testified that defendant told him that he was drinking a bottle of wine. No wine was recovered and defendant had no odor of alcohol on his breath. On search of defendant, the arresting officer found two keys; each one of which



fitted the ignition of one of the automobiles. Three wheels had been removed from one vehicle. Two of these wheels were in the trunk of the other car and the third was in the back seat. The three tires inside the car matched the one remaining on the other auto upon which defendant was working when arrested. All of these tires were Goodyear tires. The officer further testified that the owner of these tires was present in court at trial.

The owner of one of the automobiles testified that he saw three of the tires from his car in the trunk of the other car which the lady owned. He indicated she was present in court. The tires were brand-new, about four months old. The wheels to his car were also in the trunk of the lady's car. The city towed his car to the station. He identified the tires as Goodyear tires and stated, "I know my tires and I know my wheels I have got on there because I have got them marked." The lady who owned the other vehicle testified that her car was missing on a certain date and subsequently recovered. She next saw the automobile in the parking lot "in this station."

Defendant testified that he was arrested "almost at the corner of 63rd and May." He was never in the alley behind 1113 West 63rd Street until an officer took him there. The officer stopped and searched him and then arrested him. He saw some other persons, whom he had seen on the street every day, running out of the vacant lot with the police behind them. He told the police that he did not know the names or addresses of these other men. The police told him they were arresting him for a narcotics violation. He had never touched either of the cars and had never seen the ignition keys before they were shown to him in court. His hands and clothes were not dirty when he was arrested.

In urging his first contention, defendant advances the proposition that ownership of the property allegedly stolen is a material



element which the State must prove beyond a reasonable doubt to establish theft. Defendant cites and depends upon People v. Acevedo, 5 Ill. App. 3d 968, 284 N.E.2d 488. The validity of this general principle must readily be conceded. See also People v. Williams, 24 Ill. 2d 214, 181 N.E.2d 353.

However, it must be agreed with equal logic, that the proposition above stated is not applicable to the facts of the case before us. In both Acevedo and Williams, there was a lack of sufficient proof to link the defendant to the property allegedly stolen. (See 5 Ill. App. 3d 968, 969 and 24 Ill. 2d 214, 215.) Quite to the contrary, in the case before us the evidence established the identity of the property as a Goodyear tire, precisely as alleged in the complaint. The complaining witness identified three of his tires as having been found within the other car owned by the lady who testified. He also testified clearly and directly that the fourth tire was identical to the other three. The officer testified that defendant was engaged in working with the lug wrench upon the fourth tire and was thus exercising an act of dominion or possession over the stolen property. Possession of the two ignition keys links defendant to the three remaining stolen tires each of which conformed exactly to the one described in the complaint. The complaining witness also testified that his wheels had been stolen and returned to him from the trunk of the lady's car, that his tires were Goodyear tires and that he knew these tires and wheels because of markings he had placed upon them.

In addition to the above direct evidence, defendant's argument also overlooks the accepted legal principle that, "there is no legal distinction between direct and circumstantial evidence as to the weight and effect thereof." (People v. Robinson, 14 Ill. 2d 325, 331, 153 N.E.2d 65 and cases therein cited. See also People v. Dukett, 56 Ill. 2d 432, 441, 308 N.E.2d 590.) The







circumstantial evidence in this record cannot be ignored.

"Unauthorized control over stolen property may be proved by circumstantial evidence." (People v. Bullock, 123 Ill. App. 2d 30, 35, 259 N.E.2d 641.) For example, evidence of flight from the scene upon approach of the arresting officer is competent and proper evidence of guilt. (People v. Harris, 52 Ill. 2d 558, 561, 288 N.E.2d 385.) Possession of property recently stolen creates a presumption of guilt of theft. (People v. Garrett, 113 Ill. App. 2d 63, 66, 251 N.E.2d 749.) Whether defendant was in possession of the stolen property was a question of fact for the trial court to determine. (People v. Harris, 53 Ill. 2d 83, 86, 288 N.E.2d 873.) The circumstances in this case as above detailed constitute strong and convincing proof of guilt beyond reasonable doubt, particularly in view of the fact that they must be weighed against the naive and totally uncorroborated denial by defendant. (People v. Morehead, 45 Ill. 2d 326, 330, 259 N.E.2d 8, cert. denied, 400 U. S. 945. See also People v. Bullock, 123 Ill. App. 2d 30, 34, 259 N.E.2d 641 and cases therein cited.) Bullock involved facts strikingly similar to the case at bar. We find no merit in this first contention.

Defendant's second contention, regarding failure of proof of venue, is refuted by the authorities which he himself cites. It is undoubtedly incumbent upon the prosecution to prove venue beyond a reasonable doubt in every criminal case. In earlier days, the Supreme Court "insisted upon positive and strict proof of venue precisely as alleged." (People v. Pride, 16 Ill. 2d 82, 86, 156 N.E.2d 551.) In Pride, the court cited its earlier decision in People v. Long, 407 Ill. 210, 95 N.E.2d 461 and stated the general rule as applied in Long and in previous cases to the effect "that venue is proved when the evidence leads to the rational conclusion without reasonable doubt that the crime was committed in the county where the trial was held." (See 16 Ill. 2d 82, 86.) In Long, the court stated "that it is not necessary that testimony be given in so many words that the crime was committed in a given county, but that venue may be proved by circumstantial evidence."



(See 407 Ill. 210, 212.) Additional authorities following these principles and illustrating that "the formal requirements governing proof of venue have been relaxed" are People v. Allen, 413 Ill. 69, 76, 77, 107 N.E.2d 826; People v. Garrett, 113 Ill. App. 2d 63, 66, 251 N.E.2d 749; and People v. O'Connell, 84 Ill. App. 2d 184, 197, 198, 228 N.E.2d 154, cert. denied, 391 U. S. 969.

With these guidelines in mind, we note the following elements of the evidence which are sufficient to prove venue beyond reasonable doubt. The record shows that trial of this case took place in the circuit court of Cook County, municipal department, in the first municipal district, in the courtroom identified as branch 49. The city of Chicago comprises the first municipal district. The entire County of Cook comprises the first judicial district. (Ill. Const. 1970, art. VI, sec. 2, Ill. Rev. Stat. 1973, ch. 37, par. 1.1.) The arresting officer testified that he proceeded to "1113 West 63rd Street" in response to a radio call and that he arrested the defendant "at the said location." The officer testified that he and defendant were at the spot "where the tires were." Defendant testified that he was arrested while standing close to the corner of 63rd and May Streets and that the officer then took him to the alley behind 1113 West 63rd Street. In this connection, particular notice should be taken of the language of the Supreme Court in People v. Pride, 16 Ill. 2d 82, 88, 156 N.E. 2d 551, concerning the common practice of describing a location by street and number which should be applied by every court to issues of proof of venue, in the light of common knowledge, in order to arrive at a just and proper result. This testimony is important in establishing the locale of the entire incident as the city of Chicago.

The evidence also shows that the complaining witness testified that he called a Chicago police officer and conversed with him and also made out a police report. He next had contact "with



the police department\*\*\*when they called me that they had recovered my car." The officer told him that the car had been recovered on 63rd Street somewhere and in response to that he came to the police station at "6100 Racine." He further identified the station as being "this station here" clearly having reference to the location at which the trial was being conducted. The complaining witness also testified that his car was towed to the police station "by the city." The lady who owned the other automobile testified that her car was missing on a certain date; it was subsequently recovered and she "next" saw it "in the parking lot in this station" in the presence of the officer.

From these many facts, the inference must be drawn beyond reasonable doubt that the entire transaction took place within the city of Chicago. It follows necessarily that the court properly took judicial notice of the location of the city of Chicago within Cook County. (People v. Allen, 413 Ill. 69, 76, 107 N.E.2d 826 and People v. Long, 407 Ill. 210, 213, 95 N.E.2d 461.) We find proof of venue ample beyond reasonable doubt and the judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

BURKE, J., and HALLETT, J., concur.





59638

JAN 16 1975

PEOPLE OF THE STATE OF ILLINOIS	)	APPEAL FROM
	)	CIRCUIT COURT,
Plaintiff-Appellee,	)	COOK COUNTY.
	)	
v.	)	
	)	
ROY CRUZ,	)	HONORABLE
	)	LOUIS B. GARIPPO,
Defendant-Appellant.	)	PRESIDING.

Mr. JUSTICE HALLETT delivered the opinion of the court:

The defendant, Roy Cruz, was, on a bench trial, found guilty of the murder of one Alfonso Alcola, and was sentenced to serve 14 to 18 years in the penitentiary. On appeal, his sole contention is that the evidence fails to establish that he knew that his acts created a strong probability of death or great bodily harm to the victim. We disagree and affirm.

According to a written statement made by the defendant, on September 28, 1972, the defendant, Roy Cruz, and a companion, Henry Rodriguez, visited the Irondale Pizzeria near 105th Street and Hoxie Avenue, Chicago. At that time they consumed an unspecified quantity of beer and wine. Cruz and Rodriguez then left the restaurant and proceeded east on 105th Street, following the decedent Alfonso Alcola. When the decedent reached the alley in the middle of the block, the defendant stopped him and asked for a cigarette. The decedent stated he did not have one. The defendant then began to search him and, when the decedent seemed as if he might hit him, defendant drew a .22 caliber revolver from the waistband of his pants, and, when decedent swung at him, the defendant hit the decedent on the nose with the gun, which discharged, killing the victim. Defendant and his companion then ran down the alley and through a yard, and then circled back to the scene of the crime. They then returned to the pizzeria and ate. Afterward the defendant disposed of the gun down a sewer at the corner of 105th and Hoxie.

Three teen-age children testified at the trial. One





testified that she saw the defendant and Rodriguez, both of whom she knew by name, at the mouth of an alley some 10 feet away, with a third man (the victim) whom she did not know; that she heard one shot and saw the man fall; and that she then saw the defendant and Rodriguez run past her. The other two testified that, after hearing one shot, they saw the defendant and Rodriguez (both of whom they knew well) within 8 feet of where the victim, bleeding from a head wound, lay in the alley; and that they then saw the defendant and Rodriguez run away from the scene.

This brings us to the sole contention made on this appeal—that the evidence fails to establish that the defendant knew that his acts created a strong probability of death or great bodily harm to the victim. This contention has been dealt with in a number of Illinois cases. In People v. Jordan (1960), 18 Ill. 2d 489, 165 N.E. 2d 296, in affirming the conviction of the defendant of murder by stabbing, the court, at page 494, said:

"It is also apparent that there was sufficient evidence to establish the element of malice beyond a reasonable doubt. While malice is an essential element of the crime of murder it is well established that malice is implied where no considerable provocation appears or when all of the circumstances of the killing showed an abandoned and malignant heart. (Ill. Rev. Stat. 1957, chap. 38, par. 358; People v. Sally, 17 Ill. 2d 578.) It is not necessary to justify a conviction of murder that one shall have deliberately formed an intent to kill. It is sufficient if at the instant of the assault he is actuated by that wanton and reckless disregard for human life that denotes malice. (People v. Johnson, 2 Ill. 2d 165.) \* \* \*."

In People v. Jones (1962), 26 Ill. 2d 381, 186 N.E. 2d 246, in affirming a conviction of murder by striking the victim with a fist, the court, at page 385, said:

"Malice is an essential element of the crime of murder, but 'Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.' (Ill. Rev. Stat. 1959, chap. 38, par. 358.) While it is true that malice would not ordinarily be implied from an assault and battery with the hands or



fists alone, (People v. Crenshaw, 298 Ill. 412,) evidence showing the character of the assault and the circumstances under which it was made may be sufficient to establish malice. People v. Shields, 6 Ill.2d 200."

In People v. Latimer (1966), 35 Ill. 2d 178, 220 N.E. 2d 314, where the defense was that, in firing the gun, he intended only to frighten the victim and that the "death was the result of an act done without due caution or circumspection and was an accident", the court, in affirming the conviction, at pages 182-183, said:

"\* \* \* We have repeatedly held that it is not necessary to show that an accused has formed an intent to kill in order to justify a murder conviction. It is sufficient to show that he voluntarily and wilfully committed an act, the natural tendency of which was to destroy another's life, with the intent being implied from the character of the act. (People v. Winters, 29 Ill.2d 74; People v. Tillmas, 26 Ill.2d 552.) Here the evidence shows that the defendant pointed the gun and fired at Thorpe. The record does not support his argument on appeal that the death was accidental."

And in People v. Spagnola (1970), 123 Ill. App. 2d 171, 260 N.E. 2d 20, this court, in affirming a conviction of murder where the defendant struck the victim with a pool cue, at pages 186-187, said:

"\* \* \* Criminal recklessness is the intent required to reduce the degree of homicide from murder to the lesser included offense of involuntary manslaughter. See Ill Rev Stats (1965), c 38, § 9-3(a). If the act is performed with malice, either express or implied, the offense is not involuntary manslaughter, but is murder. People v. Marrow, 403 Ill 69, 73-74, 85 NE2d 34 (1949). In the case at bar, the intent or state of mind which Cunningham possessed when he struck Jack Naylor is shown by the surrounding circumstances. It is undisputed that Cunningham deliberately struck the deceased in the head with the fat end of a pool cue which he was swinging like a baseball bat and which apparently caused instantaneous death. The act was done without provocation as the deceased was unarmed and was sitting at the bar. The evidence amply supports a finding, beyond a reasonable doubt, that the act was not done recklessly, but rather was performed with implied malice. The intent to take human life may be inferred from the character of the assault. People v. Coolidge, 26 Ill2d 533, 536-37, 187 NE2d 694 (1963). The manner in which the pool cue was used in this case made it a deadly weapon. People v. Dwyer, 324 Ill 363, 155 NE 316 (1927). \* \* \*."



When the circumstances surrounding the fatal shooting of Alfonso Alcola are examined in light of the above authorities, we have no difficulty in holding that the evidence established that defendant had the intent necessary to sustain his conviction for murder. In the first place, the trial court was not obliged to accept in toto the defendant's version of how the shooting occurred. The statement, plus the testimony of the three teen-agers, certainly established that the defendant shot and killed the victim. But the pathologist's report (as to where and how the bullet entered the victim's head) gave the trial court sufficient evidence to disbelieve the defendant's version as to exactly how the shooting occurred. However, even if the defendant's version of the events surrounding the fatal shooting were to be believed by the trial court, his actions at the time of the incident certainly could be characterized as having been performed with implied malice. Swinging a loaded .22 caliber revolver at an unarmed individual, who had done nothing to provoke any conflict, certainly demonstrates a wanton and reckless disregard for human life, sufficient to show the intent required to support such a conviction. The judgment of the circuit court of Cook County is therefore affirmed.

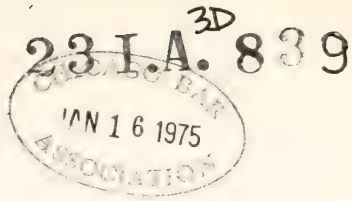
Judgment affirmed.

EGAN, P.J., and BURKE, J., concur.

Abstract only.







59897

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
	)	
vs.	)	
	)	
HENRY WELCH,	)	HON. JOHN F. HECHINGER,
	)	Presiding.
Defendant-Appellant.	)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

Henry Welch (defendant) was indicted for armed robbery (Ill. Rev. Stat. 1973, ch. 38, par. 18-2.) After a bench trial, he was found guilty and sentenced to 7 to 12 years in the penitentiary. On his appeal, he contends that testimony concerning his identification should have been suppressed and that the evidence against him was so vague, doubtful and uncertain that he was not proven guilty beyond a reasonable doubt. In opposition, the People urge that the defendant's motion to suppress the identification testimony was properly denied because a confrontation in the police station was not unnecessarily suggestive; and, in addition, there was a sufficient independent origin for the identification. The People also urge that the facts show corroboration of the identification and that the evidence is sufficient to prove guilt beyond reasonable doubt.

Defendant made a pretrial motion to suppress the identification testimony. By agreement, the testimony pertaining to this motion and to the case in chief were heard together by the trial court. It appears that on February 17, 1973, about midnight, the complaining witness was parking his car. A person, later identified by him as the defendant, walked over to the car door on the left-hand side and put a silver colored gun close to his face announcing, "This is a stickup." Defendant told the witness to empty his pockets. He complied and gave defendant a cigarette





lighter, some keys and a wallet containing \$90. The witness identified a pistol produced in court as having a silver color and being similar to that used in the robbery. The weapon was received in evidence.

The complaining witness also testified that the lighting conditions were good as there was a street light post some five feet from his automobile. Also, the defendant ordered him out of the car and, when he complied, a dome light was illuminated as the door was opened. The automobile was identified as a 1964 gray Oldsmobile. Defendant ordered the complaining witness to lay down, then entered the automobile and drove away. The witness testified that he looked at the defendant for "A matter of seconds\*\*\*" concerning which he stated on cross-examination that two seconds would be a fair estimate.

As the car left, the witness jumped up and ran after it. He immediately encountered a police squad car. He pointed out his automobile and told the officers that he had been robbed by a man with a gun. The squad car left him and gave chase. The complaining witness then proceeded directly to the police station. Some 18 or 20 minutes after he arrived he saw the defendant at the station. The witness testified that he looked at the defendant and observed that he was wearing black pants and a brown leather coat. He first saw defendant, handcuffed, seated in a room called the youth room. The police asked him to enter the room but said nothing to him concerning the identification. He then immediately stated that defendant was the person who robbed him.

Police testimony is that two officers riding in the squad car encountered the complaining witness on the street. He pointed out his gray Oldsmobile and said that he had been robbed by an armed man. They immediately chased the other car which finally stopped. The occupant of the car, identified by them as the



defendant, fled from the scene. The policemen pursued defendant and separated during the chase. They saw no other person on the street at that time or place. One of the officers found defendant hiding in an alley and placed him under arrest. There was a revolver on the ground right under where the officer found the defendant lying. The officer picked up this gun and identified it when it was produced in court. Another squad car then arrived and those officers transported defendant to the police station while the arresting officer went to locate his partner. The arresting officer testified that he lost sight of the defendant during the chase once for a period of about fifteen seconds and again for one second. He made a positive in-court identification of defendant.

Police testimony is also that, when defendant emptied his pockets at the station, he had a cigarette lighter, which complainant identified as his property, and \$16.99 in United States currency. One police officer testified that as soon as the complaining witness saw the defendant entering the station he cried, "There's the man that stuck me up." Police also testified that, after being given Miranda warnings, defendant made an oral statement that he had robbed the complaining witness and had taken the car and the lighter but no money. The substance of this statement was incorporated in a police report.

Defendant testified that he was walking to a restaurant in the vicinity about midnight. There were pedestrians walking on the other side of the street and cars driving by. He was wearing a brown leather coat and trousers which were gray and striped with black, blue and light pink. A car pulled up at the curb beside him and shots were fired. He became alarmed and hid behind a building. He did not notice the type of automobile it was. When he came out from behind the building, police called him over, searched him and then transported him to the police station. He



denied making the incriminating statement to the police; denied that he had committed the robbery; denied that he had a gun in his possession when arrested or on that day, and denied that the lighter was taken from his person. He did not know the police officers or the complaining witness and had never previously seen them. No other testimony was offered by the defense. The trial court denied the motion to suppress and then entered a finding of guilty.

In announcing these rulings, the trial court summarized his reasons in support thereof. In our opinion, his analysis was both able and pertinent. The court reasoned that the police testimony was that the complaining witness spontaneously and voluntarily identified the defendant immediately upon entry of the latter into the station. On the other hand, the complaining witness testified that he identified defendant in the so-called youth room where he first saw defendant. The court correctly stated that in either event the identification was proper and did not violate defendant's rights. This result is supported by a great weight of authority.

It must first be noted that on hearing of the motion to suppress, defendant had the burden of proving that the procedure at the police station confrontation was suggestive and unfair. (People v. Brown, 52 Ill. 2d 94, 100, 285 N.E.2d 1 citing People v. Blumenshine, 42 Ill. 2d 508, 511, 512, 250 N.E.2d 152.) See also People v. Sanders, 4 Ill. App. 3d 494, 499, 500, 280 N.E.2d 269.

If the confrontation at the police station was in fact completely spontaneous and voluntary, it would appear that no violation of defendant's rights was involved. (See People v. Bradley, 12 Ill. App. 3d 783, 787, 299 N.E.2d 99.) As the trial court correctly pointed out, under such circumstances the identification would have been neither contrived nor caused by the police. Viewing





the other alternative, that the identification took place in the so-called youth room of the police station where defendant was handcuffed, this evidence shows only that the complaining witness entered the room by police request without any suggestion to him by the police concerning identity of defendant. In any or either event, the in-court identification of defendant by the complaining witness must necessarily be held proper because, regardless of what may be said concerning the police station confrontation, the fact remains that the in-court identification is based upon sufficient, uninfluenced, prior observation of defendant by the complaining witness. This principle has been stated in virtually every volume of the reports of decisions of the Supreme Court of Illinois commencing with People v. Blumenshine, 42 Ill. 2d 508, 250 N.E.2d 152. For example, note People v. Connolly, 55 Ill. 2d 421, 427, 303 N.E.2d 409, in which the Supreme Court stated:

"We have repeatedly held that the existence of an independent origin will validate an in-court identification even though a previous identification procedure may have been impermissibly suggestive. (E. g., People v. Taylor (1972), 52 Ill. 2d 293; People v. Pagan (1972), 52 Ill. 2d 525.)"

The following uncontradicted facts provide the independent basis for a proper in-court identification. Defendant and the complaining witness were in very close proximity to each other. The lighting conditions were quite good as shown by the presence of the street light in the immediate vicinity and by the dome light of the automobile. Defendant was observed by the complaining witness for several seconds while the latter was leaving the automobile. The observation continued even after the complaining witness was lying down. The confrontation at the police station took place within minutes after commission of the crime. In addition, reading of the testimony demonstrates that the identification by this complaining witness is direct, positive and certain. It is





true that there are discrepancies in the testimony of the prosecution. There is divergence as regards whether or not defendant took a wallet and money from the complaining witness; as to the precise circumstances of the confrontation at the police station; and regarding the color of the trousers that defendant was wearing when arrested. However, it is our considered opinion that these discrepancies do not destroy the credibility of the identification but go only to the weight to be given the testimony. People v. Willis, 126 Ill. App. 2d 348, 354, 261 N.E.2d 723, leave to appeal denied 44 Ill. 2d 585.

The arguments made by defendant's counsel concerning the identification are interwoven with arguments regarding the weight and sufficiency of the evidence of guilt. The important factor which supports the rulings of the trial court, both on the motion to suppress and on the case in chief, is massive corroboration of the prosecution's case, particularly when viewed against the totally unsupported denial by the defendant. This is shown by the following.

There is strong, uncontradicted testimony that defendant was seen by the police immediately upon leaving the automobile of the complaining witness and was hotly pursued by them. One of the officers particularly had defendant in full view and lost sight of him only upon two occasions not aggregating more than a few seconds. In this regard, the testimony of the complaining witness and of the two police officers each supports the other in a strong and convincing manner. Similarly, the testimony of the police officer concerning finding of the weapon beneath defendant where he was lying to conceal himself is strongly sustained by the testimony of the complaining witness in which he identified the gun as being similar in appearance to the one used in the holdup. (See People v. Tribbett, 41 Ill. 2d 267, 270, 242 N.E. 2d 249; People v. McCasle, 35 Ill. 2d 552, 559, 221 N.E.2d 227.) The oral



statement given to the police by defendant admitting commission of the crime is also important and it is corroborated by inclusion of the substance thereof in the police report.

Possession of the cigarette lighter, identified by the complaining witness as his own property, is another strong link in the chain. This item was found in the pocket of the defendant, according to police testimony, and was included in their inventory.

In response, defendant offered only a categorical and unsupported denial which advances an untenable and virtually impossible hypothesis of innocence. "\*\*\*[W]hen a defendant elects to explain his presence at the scene of an offense it is incumbent upon him to tell a reasonable story or be judged by its improbabilities." People v. Morehead, 45 Ill. 2d 326, 330, 259 N.E.2d 8, cert. denied 400 U. S. 945 and People v. Bullock, 123 Ill. App. 2d 30, 34, 259 N.E.2d 641.

We need hardly cite authority to illustrate the principle that, upon review of a bench trial, "A court of review will not set aside a finding of guilty unless the evidence is so palpably contrary to the finding or so unreasonable, improbable or unsatisfactory as to cause reasonable doubt as to the guilt of the accused." (People v. Reese, 54 Ill. 2d 51, 58, 294 N.E.2d 288.) A fair and impartial consideration of this entire record necessarily leads us to the conclusion that proof of guilt was sufficient beyond reasonable doubt.

JUDGMENT AFFIRMED.

BURKE, J., and HALLETT, J., concur.



JAN 16 1975

59972

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY.
	)	
v.	)	
	)	
CHARLES J. HARRIS,	)	HONORABLE
	)	ROBERT E. CHERRY,
Defendant-Appellant.	)'	PRESIDING.

PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Before EGAN, P.J., BURKE and HALLETT, JJ.

Charles J. Harris, defendant, was found guilty after a bench trial of the crime of robbery in violation of Section 18-1 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 18-1). He was sentenced to a term of six to eighteen years.

Defendant wished to appeal and the Public Defender of Cook County was appointed to represent him. After examining the record, the Public Defender filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the motion has been filed. The brief states that the only possible arguments which could be raised on appeal are that the defendant did not knowingly and understandingly waive his right to a trial by jury, that the evidence was not sufficient to establish defendant's guilt beyond a reasonable doubt because the identification testimony was insufficient and that defendant's statement should have been suppressed since he was not given his proper Miranda warnings. The brief concludes that an appeal on these issues would be wholly frivolous and without merit. Defendant was mailed copies of the motion and brief on August 8, 1974. He was informed that he had until September 28, 1974, to file any additional points he might choose in support of his appeal. He has not responded.



The first possible argument which could be raised on appeal is that the defendant did not knowingly and understandingly waive his right to a trial by jury. There is no specific formula for determining whether a defendant knowingly and understandingly waived his right to a trial by jury. (People v. Richardson, 32 Ill.2d 497, 207 N.E.2d 453.) Each case depends upon the particular facts and circumstances of that case. People v. Wesley, 30 Ill.2d 131, 195 N.E.2d 708.

In the case at bar, the record reflects that when defendant's case was called, defense counsel in defendant's presence informed the trial judge that defendant wished to waive a trial by jury. The trial judge personally addressed the defendant and informed him that under the law he had a right to a jury trial. In response to questioning by the trial judge, defendant stated he wished to waive his right to a trial by jury and submit the case to trial by the court. Thereafter, defendant voluntarily signed a jury waiver. Under these circumstances we conclude that the defendant knowingly and intelligently waived his right to a trial by jury. People v. Sanders, 14 Ill.App.3d 826, 303 N.E.2d 552.

The second possible argument which could be raised on appeal is that the evidence was insufficient to establish defendant's guilt beyond a reasonable doubt because the identification testimony was insufficient. At trial, Jerry Mandybur, aged 14, testified that on November 2, 1972, at 6:30 P.M., he was making collections from his part-time job as a newspaper delivery boy. As he left the building at 944 N. Central Park, the defendant grabbed him and demanded his money. The defendant took \$20 and left. During the incident, Mandybur viewed the defendant for approximately five minutes. Mandybur testified







that he immediately went home and notified his parents of what had occurred. The police were called. Approximately one week after the incident, acting upon information supplied by a friend, Mandybur observed the defendant walking down the street. He notified the police, but they were unable to apprehend the defendant at that time. On February 8, 1973, Mandybur again acting on information supplied by a friend observed the defendant walking on the street in the vicinity of Drake and Thomas Streets, Chicago, Illinois. He immediately stopped a squad car and identified the defendant as the man who had robbed him. The police officers placed the defendant under arrest at that time. The testimony of Chicago Police Officer Biswurm established that after being arrested, defendant admitted robbing Jerry Mandybur.

In a bench trial it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where the evidence is so unsatisfactory as to raise a reasonable doubt of defendant's guilt will the findings of the trial court be disturbed. (People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385.) The identification of a defendant by a single witness is sufficient to convict if the testimony is positive and the witness credible, even though contradicted by the defendant. (People v. McVet, 7 Ill.App.3d 381, 287 N.E.2d 479.) After a review of all the evidence adduced at the trial, we find that the testimony of Jerry Mandybur was positive, credible and sufficient to establish the defendant's guilt beyond a reasonable doubt, even though defendant presented evidence to the contrary.

The third possible argument which could be raised on appeal is that defendant's statement to the police was improperly introduced into evidence since defendant was not given his



constitutional Miranda warnings. At trial, Chicago Police Officer Biswurm testified that after arresting the defendant he and his partner, Officer Keating, transported defendant to the station. There, Officer Keating read the defendant his constitutional Miranda warnings:

"\*\*\*you have a right to remain silent, if you choose not to remain silent, anything you say or write can and will be used as evidence against you in court.

"You have a right to consult a lawyer before any questioning, and you have a right to have a lawyer present during any questioning.

"You not only have a right to consult with a lawyer before any questioning, but if you lack the financial ability to retain a lawyer, a lawyer will be appointed to represent you before any questioning. And, you may have the appointed lawyer present with you during any questioning."

Defendant stated that he understood his rights and then gave an oral statement to the officers. The above quoted warnings were sufficient to comply with the requirements of Miranda v. Arizona, 384 U.S. 436.

We have examined the record and concur in the opinion of the Public Defender that the arguments thus raised do not have substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which are also not frivolous. Accordingly, the Public Defender of Cook County is granted leave to withdraw as counsel on appeal and the judgment of the circuit court of Cook County is affirmed.

MOTION ALLOWED;  
JUDGMENT AFFIRMED.

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opinions

59564

GEORGE S. LANDFIELD,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
MICHAEL J. HOWLETT, Secretary of	)	
State of Illinois,	)	HONORABLE
	)	EDWARD F. HEALY,
Defendant-Appellee.	)	PRESIDING.

Per Curiam: First District, Fifth Division.

Before Sullivan, P.J., Drucker and Lorenz, JJ.

This is a pro se appeal by George S. Landfield, plaintiff, from a judgment of the circuit court of Cook County which sustained the revocation of the Certificate of Title, 1970 registration license plate and identification card for a 1969 Honda Motorbike, Serial No. Z50A-154002, previously issued to plaintiff by the Secretary of State.

On July 29, 1969, Joy Landfield, wife of the plaintiff, then the owner of the 1969 Honda Mini-Trail Bike, filed an application for a certificate of title, indicating that she had acquired said vehicle on July 28, 1969, from plaintiff. The application was denied by the Secretary of State.

On August 20, 1969, Joy Landfield assigned her interest in the bike to plaintiff who filed a petition for an administrative hearing from the denial of the application. A hearing was held on September 12, 1969, and an order denying the application was entered on November 17, 1969.

Plaintiff and his wife filed a complaint in the circuit court for administrative review of the November 17, 1969, order, George S. Landfield and Joy Landfield v. Paul Powell, Secretary of State, case No. 69 L 18238. On April 8, 1970, an order was entered approving the action of the Secretary of State in denying said application for the Honda Mini-Trail Bike.

Plaintiff did not appeal from this order because on April 9,



1970, he applied for a certificate of title for the 1969 Honda Motorbike, Serial No. Z50A-154002, and a Certificate of Title No. E780264 was issued to him on April 15, 1970.

Thereafter the Secretary of State revoked Certificate of Title No. E780264 and 1970 Registration Plate BMCY2395 and Identification Card issued to plaintiff for the 1969 Honda Mini-Trail Bike, Serial No. Z50A-154002. Plaintiff requested a hearing which was denied by the Secretary of State on November 2, 1970.

On December 4, 1970, plaintiff filed a complaint for administrative review, George S. Landfield, Plaintiff, v. John W. Lewis, Secretary of State of Illinois, Defendant, Case No. 70 L 16962, requesting reversal of the November 2, 1970, order of the Secretary of State and the revocation order of September 14, 1970, and that the Secretary of State be directed to grant plaintiff a hearing as provided by statute (Ill. Rev. Stat. 1969, ch. 95-1/2, par. 2-118). On April 14, 1971, the trial court entered an order referring the matter "back to the Secretary of State of Illinois, with directions that an administrative hearing be held on the merits of such revocation order as provided by statute of the State of Illinois."

On August 10, 1971, and October 1, 1971, administrative hearings were held before a hearing officer duly designated by the Secretary of State. Plaintiff testified that he was the title holder of Illinois Certificate of Title No. E780264, issued on a 1969 Honda Mini-Bike, Serial No. Z50A-154002, which was revoked, together with the pertinent registration plate No. BMCY2395, by the Secretary of State on September 14, 1970. On cross-examination plaintiff stated that the mini-trail bike in this case was the same mini-bike that was involved in case No. 69 L 18238, but he made it longer by putting on a luggage carrier. He also put on a horn and mirror.

The Honda Owners Manual was introduced in evidence in which







it was stated that the Honda Mini-Trail Bike "is not designed, equipped, or approved for operation on public highways or roads" and that "We wish you many miles of safe and happy trail riding." Rule 3-406 promulgated by the Secretary of State provides that the Secretary of State shall refuse registration and the issuance of a certificate of title where the "vehicle was not designed, manufactured, marketed and sold by said manufacturer through retail vehicle dealers, for general street and highway use and operation."

On February 1, 1972, the Secretary of State found that the prior order of revocation of Certificate of Title E780264, 1970 Registration Plate BMCY2395 and Identification Card was proper and correct and should remain in full force and effect. The Secretary of State also found that plaintiff's temporary acquisition in 1970 of a certificate of title and registration was the result of "totally ignoring and in fact defying the decision of the Court affirming the prior Order of the Secretary of State in Landfield v. The Secretary of State, Number 69L18238." He noted that plaintiff's April 9, 1970, application for a certificate of title and license was prepared only one day after the circuit court's order affirming the Secretary of State's denial of such documents to plaintiff, that in the application the vehicle was described as a "Honda" or a "Honda motor cycle" instead of as a "Honda Mini-trail Bike" which plaintiff knew was the identical vehicle for which the Secretary of State had previously refused title and registration; and that such action of the Secretary of State had been affirmed by the circuit court on April 8, 1970, just the day before plaintiff prepared his application on April 9, 1970.

The Secretary of State also noted that plaintiff could have appealed the April 8, 1970, order but instead chose misrepresenta-



tion in his application to obtain a certificate of title and registration. The Secretary of State stated that these "tactics" should not be allowed to succeed or to be carried out to the "detriment of the driving public" because the manufacturer of plaintiff's mini-bike had stated that the vehicle was not "designed, equipped, or intended for highway use." The Secretary of State concluded that plaintiff's addition of some equipment to the vehicle did not make it safe for highway use.

In the instant case on June 20, 1972, the Secretary of State filed his answer which consisted of his order of February 1, 1972, affirming the revocation of the certificate of title and registration for the 1969 Honda Mini-Trail Bike, the finding and decision of the Secretary of State, and the transcript of the administrative hearing and exhibits introduced therein. He also filed a motion to dismiss the suit contending that the present action was barred by the judgment in the prior case of George S. Landfield and Joy Landfield v. Paul Powell, Secretary of State of Illinois, Circuit Court case No. 69L18238. On June 12, 1973, the trial court affirmed the decision of the Secretary of State, and plaintiff appealed.

#### Opinion

Plaintiff contends "that the previous case has no bearing whatsoever on the matter at hand" because the trial court "ordered a new hearing for plaintiff so that the merits of the revocation of plaintiff's title and registration could be made a matter of record for appeal" and that "it is obvious the Trial Court felt that the matter at hand constituted a new matter in which new evidence should be presented and a proper record made."

On the contrary, the apparent purpose of the trial court in ordering the Secretary of State to conduct a hearing was to have all the facts of record so the trial court could determine whether



the doctrine of res judicata applied. Under this doctrine a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same cause of action. The purpose of the doctrine, based upon the requirements of justice and public policy, is to end litigation except where the issue arises on appeal to set aside or reverse the former adjudication. (McCorkle v. McCorkle, 6 Ill. App.3d 1053, 287 N.E.2d 134.) Where no appeal was taken from the finding and judgment of the circuit court in the prior suit between the same parties or their privies, that finding and judgment are conclusive on the parties in the subsequent case. See Palkey v. Donichy, 18 Ill. App.2d 356, 152 N.E.2d 494.

In the case at bar plaintiff was also one of the plaintiffs in case No. 69L18238. In each case plaintiff filed an administrative review action from a determination by the Secretary of State that a certificate of title and registration of license plate should not issue for the same vehicle, a 1969 Honda Mini-Trail Bike, Serial No. Z50A-154002.

Plaintiff also argues that "if the Trial Court believed that because plaintiff didn't appeal the previous case the matter was closed, it would have sustained the Secretary of State's Motion to Dismiss Suit for Administrative Review." However, defendant did not waive the defense of res judicata by filing an answer after his motion to dismiss was denied. McCorkle; Ill. Rev. Stat. 1971, ch. 110, par. 48(5).

We believe that defendant has conclusively established that the issues involved in the present action were adjudicated in the prior action and that the doctrine of res judicata applies.

It is also apparent that the finding and decision of the





Secretary of State should be sustained for the further reason that it is not contrary to the manifest weight of the evidence. Section 11 of the Administrative Review Act (Ill. Rev. Stat. 1971, ch. 110, par. 274) providing that the findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct, limits the function of the reviewing court to ascertaining whether the agency's decision is against the manifest weight of the evidence and thus does not permit a court to review the evidence. (Davern v. Civil Service Com., 47 Ill.2d 469, 269 N.E.2d 713, U.S. cert. denied 403 U.S. 918.) The courts will not reweigh the evidence or make independent determinations of fact as long as the findings of the administrative agency are based on substantial evidence. (Lo Piccolo v. Dept. of Reg. & Education, 5 Ill. App.3d 1077, 284 N.E.2d 420.) In the instant case it was demonstrated that the manufacturer of the vehicle in question noted in its owner's manual that the "Honda Mini-Trail Bike" was "not designed, equipped or approved for operation on the public highways or roads." The statistical data found in the manual indicates that the bike is less than three feet in height and has a maximum speed of only 28 miles per hour.\* Consequently we find that the action of the Secretary of State in revoking its registration and certificate of title was not against the manifest weight of the evidence.

Plaintiff states that "the crux of this case is whether the Secretary of State is empowered by law to make rules and regulations exempting or denying title and registration to motor vehicles which the statutes require to be titled and registered." The legislature provided (Ill. Rev. Stat. 1971, ch. 95-1/2, par. 2-104)

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\* It is to be noted that the speed limit even in urban districts, 30 miles per hour, is greater than the maximum speed of the "Mini-Trail Bike." See Ill. Rev. Stat. 1971, ch. 95-1/2, par. 11-601(c)(1).





that "the Secretary may from time to time make, amend, and rescind such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act, including rules and regulations governing procedures for the filing of applications and the issuance of licenses or registrations thereunder."

The constitutional validity of the statute under which the Secretary of State revoked plaintiff's certificate of title and license was upheld in Haswell v. Powell, 38 Ill.2d 161, 230 N.E.2d 178, appeal dismissed 390 U.S. 712.

In light of the foregoing it is apparent that the doctrine of res judicata is applicable in the case at bar, and that the finding and decision of the Secretary of State is not against the manifest weight of the evidence, is based on substantial evidence and is just and reasonable in light of the evidence presented.

The judgment of the trial court is therefore affirmed.

AFFIRMED.

Abstract Only.





59918

DONALD E. SMITH,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.	)	
	)	
CHICAGO STATE UNIVERSITY, et al.,	)	HON. EDWARD F. HEALY,
	)	Presiding.
Defendants-Appellants.	)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

This action commenced with the bringing of charges against Donald E. Smith (plaintiff), a civil service employee of Chicago State University. The matter was first heard before a Hearing Board of the University Civil Service System of Illinois (defendants). The Board found plaintiff guilty of various charges and recommended his dismissal. After affirmance of this result by the Civil Service Merit Board, plaintiff filed a complaint for administrative review by the circuit court. That court reversed the dismissal as contrary to the manifest weight of the evidence. Defendants appeal.

Defendants have taken all steps necessary to perfect their appeal. Plaintiff has not appeared in this court and has filed no brief in accordance with the rules of the Supreme Court, despite the passage of several months. (Supreme Court Rule 343, 50 Ill. 2d R. 343.) In a situation of this type, our established practice, and many decisions, give us discretion to reverse the judgment without consideration of the merits of the appeal, or to examine the record and decide the case without the assistance of the absent party. Ridge Manor Convalescent Home v. Chicago, 4 Ill. App. 3d 1077, 283 N.E.2d 272. See also People v. Casey, 16 Ill. App. 3d 746, 306 N.E.2d 711; People ex rel. Pullman Bank & Trust v. Fitzgerald, 14 Ill. App. 3d 247, 302 N.E.2d 429.

We have decided to reverse the judgment pro forma. The reasons for this action have been previously stated by us in a



similar situation. Gibraltar Corp. v. Flobudd Antiques, Inc.,  
131 Ill. App. 2d 545, 547, 269 N.E.2d 515, leave to appeal  
denied 46 Ill. 2d 593.

As stated in Gibraltar, this reversal does not entail a  
decision on the merits. Also, it is not to be deemed in any  
manner as a criticism of the ruling of the trial judge.

JUDGMENT REVERSED.

EGAN, P. J., and BURKE, J., concur.

(Abstract Only)





PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Respondent-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
v.	)	OF COOK COUNTY.
	)	
JEFFREY BOYD,	)	HONORABLE
	)	REGINALD J. HOLZER,
	)	PRESIDING.
Petitioner-Appellant.	)	

PER CURIAM (First Division, First District).

Before EGAN, P.J. and BURKE and GOLDBERG, JJ.

Jeffrey Boyd, hereinafter called petitioner, appealed from the dismissal, without an evidentiary hearing, of his supplemental post-conviction petition, filed pursuant to the Illinois Post-Conviction Hearing Act (Ill.Rev.Stat. 1971, ch. 38, pars. 122-1 et seq.). The sole issue on appeal is whether the trial court properly dismissed the amended post-conviction petition without an evidentiary hearing.

The petitioner was charged with the crime of murder. On May 13, 1968, he changed his plea from not guilty to guilty. Before the trial court accepted the plea, the following discussion took place between the trial court and petitioner:

"THE COURT:	Mr. Boyd, how old are you?
"THE DEFENDANT:	Seventeen.
"THE COURT:	Do you know that when you plead guilty that you give up your right to a jury trial?
"THE DEFENDANT:	Yes.
"THE COURT:	I want to tell you, Mr. Boyd, that when you plead guilty to the crime of murder, you authorize this court to sentence you to the penitentiary for no less than fourteen years and as long as the rest of your life, or authorize this court to sentence you to die in the electric chair.





Do you know this, sir?

"THE DEFENDANT: Yes, sir.

"THE COURT: I inform you that if any promises of leniency have been made to you in an effort to get you to plead guilty to this crime, that this Court will not be bound by any such promises but will sentence you in accordance with the nature of the crime and your criminal record.

Do you understand that, sir?

"THE DEFENDANT: Yes.

"THE COURT: Now, knowing these things, do you persist in pleading guilty?

"THE DEFENDANT: Yes, sir.

"THE COURT: Then there will be a finding of guilty on the indictment.

Mr. State's Attorney, will you inform the court as to the facts?"

After the foregoing, the trial court heard a stipulation as to the facts and conducted a hearing in aggravation and mitigation. The trial court then sentenced the petitioner to not less than 25 years nor more than 50 years in the penitentiary. The petitioner did not appeal from this judgment.

The stipulation of facts disclosed that the defendant fired a rifle out the rear window of his parents' second floor apartment, killing Joseph Rys while he walked in front of 1921 South Morgan Avenue, Chicago. Petitioner admitted he shot Rys.

On June 1, 1972, the petitioner filed a pro se post-conviction petition alleging that his plea was not voluntary. On March 16, 1973, the State filed a motion to dismiss the petition and attached People's Exhibit No. 1, a transcript of the change of plea proceeding. The Public Defender of Cook County filed a supplemental petition, which alleged the insufficiency of the trial court's admonitions



and that the petitioner did not intelligently and understandingly enter his plea of guilty.

A hearing was held on the supplemental petition and the motion to dismiss filed thereto. The trial judge sustained the motion to dismiss and denied the prayer of the petition without an evidentiary hearing.

The petitioner argues that the trial court failed to give various admonishments required by Supreme Court Rule 402. However, the plea of guilty in the case at bar was entered on May 13, 1968. Supreme Court Rule 402 would not be applicable, since it did not become effective until September 1, 1970. (Ill.Rev.Stat. 1971, ch. 110A, par. 402.) Therefore, former Rule 401(b) would govern the plea of guilty in the case at bar. Ill.Rev.Stat. 1969, ch. 110A, par. 401.

The petitioner contends that his plea of guilty was not entered voluntarily and knowingly. The record discloses that when the petitioner changed his plea from not guilty to guilty he was represented by counsel. By interrogation of the trial court, the petitioner stated he knew of his right to a trial by jury and that he would be waiving that right; that if he pleaded guilty to the crime of murder, the trial court could sentence him to the penitentiary for no less than fourteen years and as long as the rest of his life; and that the trial court would not be bound by any promises of leniency which might have been made to him to get him to plead guilty to the crime of murder, but would sentence him in accordance with the nature of the crime and his criminal record. The petitioner stated that knowing all these things he still persisted in pleading guilty. The prosecutor read to the court the stipulated facts which, if introduced at trial, would establish the guilt of petitioner.

The record further discloses that the trial court found the petitioner guilty and, after a hearing in aggravation and mitigation, sentenced the petitioner to not less than 25 years nor more than 50 years in the penitentiary. The record also shows that no direct appeal was taken from this judgment.



Under the provisions of Rule 401(b) in effect at the time the petitioner pleaded guilty, he was adequately admonished. (People v. Harris, 50 Ill.2d 31, 33, 276 N.E.2d 327.) The record is sufficient to show that the defendant knowingly and voluntarily pleaded guilty to the offense of murder. People v. Barber, 51 Ill.2d 268, 270, 281 N.E.2d 676; People v. Arndt, 49 Ill.2d 530, 276 N.E.2d 306; People v. Payne, 16 Ill.App.3d 83, 88, 305 N.E.2d 700.

The petitioner also argues that by the State moving to dismiss the petition instead of filing an answer, it admitted as true the allegation contained in paragraph 12 of the supplemental petition that "The defendant-petitioner failed to intelligently and understandingly enter his plea of guilty." and, therefore, it was error to dismiss the petition without an evidentiary hearing. A motion to dismiss a post-conviction petition admits as true all allegations of fact properly pleaded but not mere conclusions of the pleader. (People v. Funches, 9 Ill.App.3d 372, 376, 292 N.E.2d 187; People v. Olson, 46 Ill.2d 167, 169, 263 N.E.2d 92; People v. Smith, 44 Ill.2d 272, 275, 255 N.E.2d 450; People v. Payne, 16 Ill.App.3d 83, 86, 305 N.E.2d 700.) The foregoing allegation was a mere conclusion of the pleader. Further, the petitioner is not entitled to an evidentiary hearing as a matter of right, since the dismissal of a non-meritorious petition on motion is within the contemplation of the Post-Conviction Hearing Act and is necessary to the orderly and expeditious disposition of such a petition. People v. Collins, 39 Ill.2d 286, 235 N.E.2d 570; People v. Funches, 9 Ill.App.3d 372, 292 N.E.2d 187.

The trial court properly dismissed the supplemental post-conviction petition without an evidentiary hearing.

The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.



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PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
vs.	)	COOK COUNTY
	)	
WILLIAM HELSE,	)	HON. BENJAMIN MACKOFF,
	)	Presiding
Defendant-Appellant.	)	

PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Before Egan, P.J., Burke and Hallett, JJ.

William Helse was charged by six indictments with two charges of possession of burglary tools, two charges of burglary and three charges of bail jumping. On July 23, 1973, defendant entered a negotiated plea of guilty and was sentenced to terms of one to two years on the two charges of possession of burglary tools, two to five years on two charges of burglary, one to three years on two charges of bail jumping, and one to two years on a charge of bail jumping, all sentences to run concurrently. On August 9, 1973, defendant filed a motion to withdraw his plea of guilty. The motion was denied by the trial court and defendant appeals.

On July 23, 1973, when defendant's case was called, privately retained defense counsel informed the trial judge that defendant wished to enter a plea of guilty. The trial judge informed defendant of the charge in each indictment, and defendant stated that he wished to enter a plea of guilty to all six indictments. The trial judge advised the defendant that upon his plea of guilty he would waive his constitutional right to remain silent and not to incriminate himself, his right to have the State prove him guilty beyond a reasonable doubt in each indictment, and his right to have a jury of twelve men and women decide whether the State had proven him guilty beyond a reasonable doubt.





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Defendant stated that he understood there had been a pre-trial conference and that upon a plea of guilty the State would recommend a sentence of from two to five years. Defendant stated that no threats had been made to induce his plea of guilty and that he was pleading guilty because he was in fact guilty. The trial judge admonished the defendant as to the statutory penalties for each offense at the time of their commission and at the time of trial. Defendant stated that he was electing to be sentenced under the law in effect at the time the crimes were committed. The facts which provided the basis for each of the indictments were then stipulated to by the parties. Defendant persisted in his plea of guilty, which was accepted.

On appeal, defendant contends that the trial court erred in failing to grant the motion to withdraw his plea of guilty. Defendant first argues that the trial court should have permitted him to withdraw his plea of guilty because he was under a misapprehension that he would receive credit for all the time he had spent in jail on all offenses. Where it appears that a plea of guilty was entered on a misapprehension of the facts or the law, the court should permit the withdrawal of the plea of guilty and allow the accused to plead anew. (People v. Morreale, 412 Ill. 528, 107 N.E.2d 721.) However, on a motion to withdraw a plea of guilty, the burden is on the defendant. People v. Walston, 38 Ill. 2d 39, 230 N.E.2d 233.

The record reflects that after defendant entered his plea of guilty, but prior to sentencing, there was a discussion between defendant and the trial judge as to whether defendant would receive a credit for the time he had been incarcerated. The trial judge informed the defendant that under the law he would receive a sentence credit for all the time he had spent in jail on each charge that was pending while the defendant was



in jail. Defendant was incarcerated at different times and various charges were placed against him at different times. The trial judge carefully explained to the defendant that the sentence credit would only apply to the charges pending against defendant while he was incarcerated at any given point in time.

After the discussion regarding a sentence credit, defendant waived his right to a pre-sentence investigation, made an election to be sentenced under the law in effect at the time of the commission of the crimes and participated in a hearing in aggravation and mitigation. Defendant did not at that time make a motion to withdraw his plea of guilty and did not in any manner indicate that he did not understand what the trial judge had told him. Several months later defendant, represented by new privately retained counsel, filed an extensive 11-point motion to withdraw his plea of guilty. In that motion defendant did not argue that he was under a misapprehension that he would receive a sentence credit for all the time he had spent in jail on all charges. Under these circumstances we conclude that defendant has failed to show that his plea of guilty was entered under a misapprehension of the facts or the law.

Defendant next contends that his motion to withdraw his plea of guilty should have been granted because the trial judge failed to comply with Supreme Court Rule 402 (Ill. Rev. Stat. 1971, ch. 110A, par. 402) in accepting his plea of guilty. Supreme Court Rule 402, which was in effect at the time defendant entered his plea of guilty, sets forth the procedure which must be followed in accepting pleas of guilty. However, the rule requires only substantial compliance with its terms (People v. Reed, 3 Ill. App. 3d 293, 278 N.E.2d 524), and the Illinois Supreme Court has indicated a realistic approach to the construction of the rule. People v. Mendoza, 48 Ill. 2d 371, 270 N.E.2d 30.



Defendant argues that he was not advised of the possibility of consecutive sentences. This court has held that where a defendant enters a negotiated plea of guilty and consecutive sentences are not imposed, the failure of a trial judge to inform a defendant that sentences could be imposed consecutively does not demonstrate a failure to comply with Supreme Court Rule 402. People v. Dixon, 20 Ill. App. 3d 65, 314 N.E.2d 697; People v. Reed, 3 Ill. App. 3d 293, 278 N.E.2d 524.

Defendant next argues that the trial judge failed to properly admonish him as to the nature of the charges. The rule that defendant be advised of the nature of the charges against him does not require the trial judge to recite all the facts which constitute the offense. This court has held that the admonishment of the crime by name is sufficient to apprise defendant as to the nature of the crime charged. (People v. Carrion, 21 Ill. App. 3d 195, 315 N.E.2d 251; People v. Tennyson, 9 Ill. App. 3d 329, 292 N.E.2d 223; People v. Wintersmith, 9 Ill. App. 3d 327, 292 N.E.2d 220.) Here, the trial judge specifically informed defendant of the crime charged in each indictment prior to accepting his plea of guilty. Defendant stated that he wished to enter a plea of guilty to each of the indictments. This was sufficient to apprise defendant of the nature of the charges.

Defendant also argues that the trial judge failed to advise him of his right to confront the witnesses against him. The record demonstrates that the trial judge informed defendant as to the nature of the charge and the possible statutory penalty for each of the crimes charged, both at the time they were committed and at the time of trial. Defendant was admonished that on a plea of guilty he waived his right to remain silent, his right to have the State prove him guilty beyond a reasonable doubt, and his right to a jury trial. Defendant stated that he understood that by entering a plea of guilty he admitted his



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guilt. Defendant stated that he knew there had been a pre-trial conference and that upon a plea of guilty the State would recommend a sentence of two to five years. No threats had been used to induce defendant to plead guilty. Upon these facts we conclude that the admonishments given defendant were sufficient to constitute substantial compliance with Supreme Court Rule 402. Defendant's plea of guilty was voluntarily and understandingly entered. People v. Campbell, 13 Ill. App. 3d 237, 300 N.E.2d 568.

Defendant next contends that his motion to withdraw his plea of guilty should have been granted because the plea was coerced by the trial judge's failure to grant defendant's motion for a continuance. On July 23, 1973, when defendant's case was called, privately retained defense counsel moved to withdraw. At that time defendant indicated dissatisfaction with his attorney and stated that he wished to hire new counsel. Defendant's motion for a continuance was denied. Defendant now argues that this denial of his request for a continuance to obtain new counsel coerced his plea of guilty. While defendant has a right to change attorneys, that right is not so absolute that its exercise may not be denied where it will unduly prejudice the other parties or interfere with the administration of justice. People v. Washington, 41 Ill. 2d 16, 241 N.E.2d 425.

In the case at bar, the record reflects that at his arraignment defendant was represented by the Public Defender of Cook County. Thereafter, privately retained counsel filed his appearance to represent defendant. One month later defendant again changed attorneys and his privately retained trial counsel filed an appearance. The defendant's case was continued several times and was set for trial on July 23, 1973. Prior to July 23, 1973, defendant had not indicated any dissatisfaction







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with his privately retained counsel. Defendant's counsel had represented him for over two months prior to trial and had investigated the case. In denying defendant's motion the trial judge stated that the case had been continued several times and the witnesses were present in court. Under these circumstances the trial court's denial of defendant's motion for a continuance was not an abuse of discretion and did not coerce defendant's plea of guilty.

Defendant's final contention is that the trial court erred in denying his motion to withdraw his plea of guilty based upon the fact that the court had lost jurisdiction. Defendant entered his plea of guilty on July 23, 1973. On August 6, 1973, his new privately retained defense counsel filed a motion to stay the mittimus. In that motion counsel stated that it was his intent within the next few days to file a motion to vacate the plea of guilty. The motion to stay the mittimus was granted and continued several times. On September 20, 1973, counsel filed a motion to withdraw defendant's plea of guilty. The trial judge denied the motion, holding that since more than 30 days had elapsed since the rendition of the judgment, the court had lost jurisdiction. Defendant now urges that because his motion to stay the mittimus stated that it was his intent to file a motion to withdraw his plea of guilty, the continuances of the motion to stay the mittimus had the effect of extending the 30-day period within which to file such a motion to withdraw his plea of guilty.

We have previously held that defendant's plea of guilty was knowingly and understandingly entered and that defendant's motion to vacate his plea of guilty was properly denied. Therefore, we need not decide whether the trial court properly ruled that it had lost jurisdiction. It is the correctness of the



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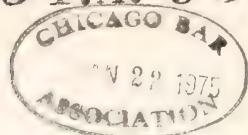
trial court's judgment, not the reasons assigned for the judgment, that is up for review. If the judgment of the trial court is correct, a court of review will not disturb it, whether the judgment was arrived at for the right or wrong reasons.

People v. Pahl, 124 Ill. App. 2d 177, 260 N.E.2d 405; People v. Tobe, 49 Ill. 2d 538, 276 N.E.2d 294.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED





No. 57981

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellant,	)	
	)	COURT OF COOK COUNTY.
v.	)	
	)	HONORABLE
CHARLES ROBINSON and	)	DANIEL J. RYAN,
JESSE REDWOOD,	)	PRESIDING.
	)	
Defendants-Appellees.	)	

MR. PRESIDING JUSTICE McNAMARA delivered the opinion of the court:

The State, pursuant to Supreme Court Rule 604(a)(1), appeals from an order of the circuit court of Cook County quashing the arrests of defendants, Charles Robinson and Jesse Redwood, and suppressing the evidence seized incident thereto. Defendants, who had been charged with burglary, made the motion to suppress on the ground that the arresting officer lacked probable cause justifying their arrests. The trial court conducted a hearing on the motion, and at its conclusion entered the order in question. At the hearing the following evidence was adduced.

Robinson testified that at approximately 10:30 a.m. on October 28, 1971, Redwood and he were exiting an alley in the City of Chicago. At the time Robinson was carrying an unconcealed shotgun in his right hand and a portable television set in his left. Redwood was carrying a non-transparent laundry bag which was open at the top. As they were about to cross the street, a man dressed in plain clothes approached them with a drawn revolver, identified himself as a police officer, and took the items away. Robinson testified further that neither he nor Redwood had violated any law prior to this confrontation, and that the officer had not produced any type of warrant.

After Robinson had concluded his testimony, defendants rested. The prosecutor indicated that he intended to use the items seized as evidence at trial to prove the commission of a burglary by defendants. The State thereupon called two witnesses to testify on its behalf.



Officer Edward Hobbs testified that at approximately 11:30 a.m. on the day in question he was on the 4900 block of West Adams Street in Chicago. He noticed the two defendants farther up the street come through a gangway and look both ways before proceeding to cross the street at a brisk pace. Hobbs was off-duty and dressed in plain clothes. Hobbs was able to see that Robinson was carrying a portable television set in one hand and a shotgun and trench coat in the other hand. Although the shotgun was being carried upside down with the trench coat placed over the trigger, the officer was able to observe sixteen or seventeen inches of the barrel and butt end of the gun protruding and immediately perceived that Robinson was carrying a "long barreled shotgun." Redwood was carrying a laundry bag open at the top with objects protruding which the officer could not identify. Hobbs did not see Redwood carrying any weapons. Hobbs followed defendants across the street, and then he approached them from the rear with his revolver drawn and his star and identification displayed. When the officer asked defendants where they had obtained the gun and television set, Robinson replied that they were helping his sister move. Hobbs took the shotgun away and, gun in hand, marched defendants down an alley. On direct examination, Hobbs testified that they were proceeding to Robinson's sister's home, but on cross-examination stated that he was walking down the alley for the purpose of obtaining assistance. While they were walking down the alley, Robinson asked Hobbs, "[W]hy are you brother policemen always wanting to stop us brothers, arrest us brothers?" Hobbs could not recall his response to the question.

After walking approximately a block into the alley, the three men reached a courtyard building with an adjacent gangway and garage. Officer Hobbs instructed the defendants to put down the objects they were still carrying and to put their hands up on the garage wall. The officer asked three men working nearby to call the police for "assistance" and to report that he





had "two suspicious men in the alley." When the bystanders refused to follow Hobbs' request, he sought help farther down the alley. Defendants then fled. They were apprehended later in a building located at 4818 Monroe. Officer Hobbs testified that it was not until 5:00 p.m. that he learned that a burglary had taken place in the area of his confrontation with defendants.

Over the continuing objection of defendants, another police officer testified to the circumstances surrounding defendants' subsequent apprehension.

Defendants' assigned counsel's position throughout this cause has been that defendants' initial confrontation with Officer Hobbs on the street constituted illegal arrests predicated upon facts insufficient to establish probable cause. The State's position has varied constantly. At the hearing on the motion to suppress, the prosecutor insisted that the arrests did not take place until defendants bolted from detention in the alley. In its brief before this court, the State abandoned this argument and claimed that the arrests took place at the time of Hobbs' initial encounter with defendants on the street. At oral argument, the State, while professing to stand on its brief, devoted its entire argument to the proposition that the case was governed by the principles of Terry v. Ohio, *infra*.

Whether its oral argument is considered an attempt to revive its earlier position in the trial court or a totally new argument, the State is precluded under Supreme Court Rule 341 (e)(7) from raising the contention at this late date. That rule reads in relevant part as follows: "Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Nevertheless, we elect to relax the waiver rule, and will consider the argument first raised at oral argument. See People v. Marro (1972), 4 Ill.App. 3d 197, 280 N.E.2d 560.



We consider the State's contention that the present case is governed by Terry v. Ohio (1968), 392 U.S. 1, to be totally devoid of merit. In Terry, the Supreme Court was faced with the problem of striking a balance between an individual's constitutional rights to privacy and freedom from unreasonable searches and seizures and an investigating officer's right of protection from bodily harm and duty of preventing and detecting crime relating to on-the-street encounters between the officer and an individual involved in suspicious activity. The court held that, even absent probable cause to arrest and to conduct an incidental full-blown search of the person, where a police officer "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous \*\*\* and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." Terry v. Ohio, supra, at p.30.

Even if we were to assume that facts such as those adduced at the hearing would be sufficient to permit a stop and frisk of the defendants, and even if we assume that the officer's drawing a gun would not destroy the stop and at the same time create technical arrests, nevertheless the record clearly shows that the officer elected to make the arrests and forego investigative stop procedures. There is no indication from Officer Hobbs that he was concerned at the time of his initial observations that a possible firearm violation was occurring in his presence. Indeed, as we shall observe later, he discounted at that time the most obvious firearm violation. The record also fails to disclose that Hobbs ever frisked either defendant for weapons.



In determining that the arrests took place on the street, we note that an arrest requires "a purpose or intention to effect an arrest under a real or pretended authority, an actual or constructive seizure or detention of the person to be arrested by one having the present power to control him, a communication by the arresting officer of his intention to arrest, and an understanding by the person to be arrested that such is the intention of the arresting officer." People v. Jackson (1968), 98 Ill.App.2d 238, 244, 240 N.E.2d 421.

The record clearly shows that the police officer approached the defendants with his gun drawn and identification badge displayed. With gun in hand, he marched defendants down an alley, ordered them to put their possessions down, and place their hands against a wall. As they walked down the alley, the conversation between the officer and Robinson indicated that an arrest had taken place. At the hearing Officer Hobbs also confirmed his earlier testimony before the grand jury that he had arrested defendants by the time they had reached the alley courtyard. Thus, the record convincingly reveals that the trial judge was correct in holding that Officer Hobbs had effected defendants' arrests at the time of their initial confrontation on the street.

In its brief, the State also contends that the arrests of defendants were predicated upon probable cause. It first argues that at the time Hobbs observed defendants and approached them with his gun drawn he was under the reasonable belief that a section of the criminal statute pertaining to unlawful use of weapons was being violated in his presence. That section, Ill. Rev.Stat. 1971, ch.38, par.24-1(a)(7), reads in pertinent part as follows:

A person commits the offense of unlawful use of weapons when he knowingly

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possesses or carries \*\*\* any shotgun with a barrel less than 18 inches in length \*\*\*.



Once again the State is precluded from advancing this theory on appeal. At no time in the trial court did the prosecutor offer this justification for the arrests. Consequently, the State may not alter its theory of the underlying cause of an arrest for the first time on appeal in the hope of proving the existence of probable cause for an arrest. (People v. Holmes (1974), 20 Ill.App.3d 167, 312 N.E.2d 748.) Moreover, even if the State were permitted to advance this theory as justification for the arrests, in our judgment, it is unsupportable. Initially, we observe that the argument could only pertain to Robinson, since it is conceded that the officer did not see any weapons on Redwood. Yet Hobbs testified that at the time he had first observed Robinson, he was able to identify the non-concealed weapon as "long barreled." He was able to note "sixteen or seventeen inches" of the barrel and butt end of the gun protruding from underneath Robinson's arm. Clearly, the motivating factor in the arrests of defendants was not par.24-1(a)(7).

The State next suggests that a different section of the statute referring to the unlawful use of weapons, namely par. 24-1(a)(10), was the probable reason underlying Robinson's arrest. That section provides in relevant part that with certain exceptions a crime is committed where one carries or possesses on his person any loaded pistol, revolver, or other firearm. However, this argument has no merit since this section was not passed by the legislature until the very date of these arrests and did not become effective until July 1, 1972, more than eight months after the arrests were made. Laws of 1971, p.3191; Ill.Rev.Stat. 1973, ch.38,par.24-1(a)(10).

The State also urges as a justification for defendants' arrests the argument that Officer Hobbs had reasonable cause to believe that defendants had committed a burglary.

At the time of Officer Hobbs' observations, defendants







had just exited a gangway and were preparing to cross the street. They looked both ways before proceeding across the street in a brisk manner. It was about 11:30 a.m. One defendant was carrying a portable television set and a shotgun. The officer did not believe that the shotgun was being carried in violation of the law. The other defendant was carrying a large, non-transparent laundry bag with non-identifiable objects protruding.

While the circumstances certainly should have engendered suspicion on the part of the police officer, they did not rise to the requirements of probable cause that a crime had been committed and that defendants had committed it. The officer had neither been informed of a theft nor had observed one. The hour was reasonable. The bag carried by Redwood was not transparent and the items were not identifiable. (Compare People v. Jones (1964), 31 Ill.2d 42, 198 N.E.2d 821, cert. den. 1964, 379 U.S. 864.) On these facts, defendants' arrests were not warranted. People v. Chatman (1944), 322 Ill.App. 519, 54 N.E. 2d 631.

At the time of his initial observations, Officer Hobbs had several options which would have comported with basic constitutional principles. He could have elected to follow the men at a distance to secure additional information and confirm his original suspicions. He could have notified police headquarters of his observations and, if not learn of a reported burglary, presumably initiate an immediate investigation to determine if any crime had been committed. The officer could have simply questioned the men thoroughly. The one thing the officer could not do was in fact the only thing he did - arrest the defendants, demand that they yield their possessions and place their hands against the wall, and attempt to report to police headquarters that he had arrested two suspicious men.

The State finally contends that even if no probable cause existed at the time of defendants' arrests, it did exist at the time of their final apprehension in the building on Monroe Street.



Once an arrest is found to have been illegal, evidence seized incident to that arrest must be suppressed unless the State can prove that the primary taint had been purged by the time that the challenged evidence was seized by the police.

Wong Sun v. United States (1963), 371 U.S. 471; People v. Riszowski (1974, No. 58233, 58234), --Ill.App.3d--.

The State has made no attempt to prove that the original illegality had been dissipated by the time of defendants' final apprehension. It has merely cited cases for the proposition that escape is not the proper remedy for one who believes himself to be unlawfully held in custody. However, the validity of these holdings has no effect on the present case. Defendants were not tried for unlawful escape from custody, but for burglary. Their arrests were improper, and the suppressed evidence was the poisonous fruit of those arrests.

For the reasons stated, the order of the circuit court of Cook County quashing the arrests and suppressing the evidence seized incident to those arrests is affirmed.

Order affirmed.

McGLOON and MEJDA, JJ., concur.



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PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	
v.	)	Court of Cook County.
	)	
	)	
NATE P. PASSARO,	)	Honorable
	)	James P. Piragine,
Defendant-Appellant.	)	Judge Presiding.

BEFORE McNAMARA, P.J., AND DEMPSEY AND MEJDA, JJ.

PER CURIAM:

The defendant, Nate Passaro, was charged with two offenses of battery (Ill.Rev.Stat., 1971, ch. 38, par. 12-3). After bench trials on each charge held on June 12, 1972, he was found guilty. He was placed on probation for a period of one year and fined \$90 for each offense, the sentences to run concurrently. No court reporter was present at the trials.

On July 10, 1972, he filed a written motion for a new trial. On August 9, 1972, and October 19, 1972, hearings were held on the motion. Prior to the hearing, defense counsel suggested to the trial judge that since the judge would be a witness at the hearing he should excuse himself and have the motion heard by a different judge. The trial judge refused to disqualify himself.

At the hearing, James Cutrone testified that he was the attorney who represented the defendant at trial. Cutrone stated that during the second trial, after the evidence was closed but before the judge had entered a finding, the judge had stated that the complaining witness had appeared before him the day after the alleged occurrence, at which time she swore to the contents of the complaint;



that the judge had stated that at that time he observed the injuries to complaining witness' face and that those injuries were inconsistent with the trial testimony of the defendant.

The judge stated that defense counsel was making an improper inference against him and he actively cross-examined counsel. The judge said that he had made no statements until after finding the defendant guilty.

Thereafter, the judge recalled Cutrone as a witness. Under the court's examination, Cutrone testified that on the date of trial he was also representing the defendant on a third charge which was subsequently dismissed.

Diane Passaro, the complainant, testified that she was present at the trial of the defendant on June 12, 1972, and that Cutrone's testimony was substantially what the trial judge had said at the trial.

Michael Ettinger testified that he was the assistant State's attorney who prosecuted the defendant. Ettinger testified that he recalled the trial judge stating that he had observed the complaining witness' injuries when she originally signed the complaint, but he did not recall at what time, during or after the trial, the statements were made, nor did he recall the trial judge stating that the injuries were inconsistent with the defendant's trial testimony. Ettinger further testified that prior to the closing arguments of both sides the judge did not make any statement to the effect that defendant was a vicious, dangerous man and the beating was brutal.





The judge thereupon had himself sworn as a witness. He testified that he was the trial judge presiding at defendant's trial. He said that he did not at any point during or after the trial make a statement that the injuries which he observed on the complainant were inconsistent with the defendant's trial testimony. The judge denied ever stating at trial that the beating was vicious or brutal. He testified that after he found the defendant guilty he did make a statement that he had seen the complaining witness' injuries at the time she signed the complaint and that the defendant was dangerous. He also testified that when the complaining witness appeared before him to sign the complaint he had stated that the "man was vicious, dangerous, and the beating was brutal."

On appeal, defendant argues that the trial judge erred in presiding over the hearing and arguments on the post trial motion, since he found himself in the position of a witness. A review of the record shows that the judge acted as judge, advocate and witness. He made comments during the testimony of Cutrone and took an active part in Cutrone's cross-examination. Subsequently, he had himself sworn in as a witness and proceeded to testify. In our system of justice a judge cannot act in the dual capacity of judge and advocate or of a judge and witness. In post conviction matters the trial judge should excuse himself when it appears that he may be a potential witness. People v. Wilson (1967), 37 Ill.2d 617, 230 N.E.2d 194; People v. Dennis (1973), 14 Ill.App.3d 493, 302 N.E.2d 651.

Ordinarily a motion for a new trial should be heard by the judge who presided at the trial. However, where the trial judge is himself a witness who will testify at the hearing on the post



trial motion, the motion should be heard by a different judge. Here, the trial judge erred in hearing the motion for a new trial knowing that he would be a witness at that hearing. Under these circumstances he should have excused himself and transferred the motion for a new trial to a different judge.

Defendant argues that his conviction should be reversed and remanded for a new trial, while the State argues that the cause should only be remanded for a new hearing on the motion for a new trial. The basis for defendant's argument is that the hearing on the motion for a new trial demonstrated that the trial judge, in finding the defendant guilty, acted upon his personal knowledge, using facts outside the record. A review of the testimony demonstrates that there is a direct contradiction between the testimony of the defense attorney and that of the trial judge. Since we have held that the trial judge acted improperly as both witness and judge, there was no proper determination of the credibility of the witnesses. We, therefore, reverse and remand for a new hearing on the motion for a new trial before a different trial judge who can properly make such a determination.

Accordingly, the judgment of the Circuit Court of Cook County, denying defendant's motion for a new trial, is reversed and the cause is remanded with instructions to hold a new hearing on the motion before a different trial judge.

Reversed and remanded  
with directions.



231A. 976  
3D  
JUN 29 1975  
ASSOCIATION

No. 58536

PEOPLE OF THE STATE OF ILLINOIS, )  
 ) APPEAL FROM THE CIRCUIT  
Plaintiff-Appellee, )  
 ) COURT OF COOK COUNTY.  
v. )  
 ) HONORABLE  
ELLIOT TAYLOR, ) IRWIN COHEN,  
 ) PRESIDING.  
Defendant-Appellant. )

Before McNAMARA, P.J., DEMPSEY and MEJDA, JJ.

PER CURIAM:

Elliot Taylor (defendant) was charged in criminal complaints with the offenses of theft and aggravated assault, in violation of sections 16-1 and 12-2 of the Criminal Code; after a bench trial he was found guilty as charged and sentenced to concurrent terms of one year in the county jail. (Ill.Rev.Stat. 1971, ch. 38,pars.16-1,12-2.) On appeal he contends that the trial court committed error in failing to suppress a statement made to police after his arrest and in failing to suppress evidence seized without a warrant; that he did not properly waive his right to a jury trial; and that he was not proven guilty of the offenses beyond a reasonable doubt.

At approximately 11:30 p.m. on August 7, 1972, Mark Musio, the complaining witness, met two girls, Betty Morris and Debbie Wagers Turner, on a street corner in Chicago and drove them to Betty's apartment for the purpose of engaging in sexual relations with her; the apartment was located in the 3400 block of North Elaine Place in the city. Upon their arrival about midnight at the apartment, Betty changed clothing in a bedroom while Musio took a seat in the living room. Shortly thereafter the defendant, Michael Wagers and Al Turner entered the apartment, and defendant asked Musio how much money he was carrying; Musio replied he had \$11. Michael Wagers took Musio's wallet and removed the money; the wallet was later returned. Musio told the men that he had no more money, and defendant then produced a knife which he held about six inches from Musio's throat, questioning him concerning the property in his apartment. Defendant and Wagers left the room; defendant later



returned and told Musio that he wished to go to Musio's apartment; and Musio, defendant, Wagers and Debbie (Wagers' sister) left in Musio's automobile for his apartment. While stereo equipment was being removed from Musio's apartment to his automobile, Wagers told Musio that defendant was going to "hurt me no matter what;" defendant brandished a knife and "kept an eye on" Musio during that time. Musio testified that he was afraid of defendant but that he was not afraid of Wagers and Wagers' sister, although he "feared the situation" while in the presence of the latter two persons.

Musio and the others returned to the Elaine Place building at approximately 1:30 a.m. where Musio was "forced" to remove the stereo equipment from the vehicle to the rear porch of the building; the last he saw of the equipment at that time was when he observed defendant removing it to another apartment in the building. Defendant had also taken Musio's wristwatch upon their return from Musio's apartment.

Defendant thereafter told Musio that he wished Musio to drive him "somewhere," and Musio, defendant, Wagers and Debbie again left the Elaine Place building in Musio's automobile. At a nearby corner the trunk lid of the vehicle flew open and when defendant exited to close the lid, Musio drove away at the suggestion of Michael Wagers. Musio thereafter observed a police car on the street; he informed the officers of the robbery, although he did not at that time implicate Wagers in the offense, and Musio, Wagers, Wagers' sister and the officers proceeded to the Elaine Place building. While at the building Musio apparently observed defendant on the rear stairway but was unable to identify him because defendant was in the shadows; the police made no arrests at that time, although they looked for defendant in several apartments. About 2:30 a.m. Musio drove Wagers, Wagers' sister and Wagers' wife to the Damen Avenue police station.







At some point between the time that Musio drove off and left defendant on the street as he attempted to close the trunk lid and the time of Musio and the Wagers' arrival at the police station, Michael Wagers had indicated to Musio that he would secure the return of the latter's property; Musio testified that there "had been" and there "had not been" a discussion at that time of sexual relations with Debbie in return for the stereo or money, and that they stopped at Debbie's home for a brief time but did not enter the apartment.

Upon their arrival at the police station, Musio told Officer Fornelli of the incident. While at the station Musio did not object when he overheard Wagers fabricate a story to the police, to the effect that defendant had "jumped into" Musio's automobile prior to the robbery. Musio later implicated Michael Wagers in the offense. Musio testified that he himself did not initially tell the truth to the police because he was "shaken up," but that he told the truth shortly thereafter. Musio saw defendant at the police station thereafter, where he also observed his wristwatch and his stereo equipment. Musio had not known defendant or Michael Wagers before, and at no time did he tell the police that he was not certain that defendant was one of the assailants. Musio identified at trial People's Exhibits 1 and 2 as, respectively, the knife wielded by defendant in Betty Morris' apartment and his wristwatch.

Chicago Police Investigator Dan Fornelli testified for the State that he had received notice of the robbery in question and had arrested defendant outside the Elaine Place building about 3:15 a.m. on August 8, 1972. Defendant and defendant's wife were transported to the Damen Avenue police station and at approximately 4:20 a.m., after having been advised of his constitutional rights and in the presence of the witness, Officer Kurth and defendant's wife, defendant made a statement to the witness that he had been involved in a robbery. Officer Fornelli first saw complaining witness Musio about 2:30 that morning, but



Musio did not implicate Michael Wagers in the offense until 5:00 or 5:30 a.m. Musio told the officer that he had picked up two girls and accompanied them to an apartment after which three men entered the apartment; Musio told the officer that he first gave money to the men after which a knife was produced. The officer had been to the Elaine Place building on about five occasions that morning, but he had no warrant for defendant's arrest or for the search of his apartment. The officer recovered a wristwatch (People's Exhibit 2) at the building about 6:00 or 6:30 a.m. in the presence of defendant's wife; he recovered a knife (People's Exhibit 1) from Wagers' sister about 3:00 a.m.; and he recovered stereo equipment from vacant apartment 306 in the building, which he had entered by means of the building manager's key. The officer testified that Musio had never stated that defendant was not the man who committed the robbery.

A motion to suppress the wristwatch and the stereo equipment, and a motion to suppress the statement given to Officer Fornelli were made by defendant during trial; the motions were denied. The motion to suppress the property was based upon the fact that no warrant had been issued for its seizure and that the seizure of that property was otherwise illegal; the motion to suppress the statement was based upon the fact that Officer Kurth (Officer Fornelli's partner) had not been called as a witness concerning the statement although he was present when the statement was taken. The knife, the wristwatch and the stereo equipment were subsequently admitted into evidence at trial.

Defendant's wife testified for defendant that she was present in Betty Morris' apartment when the police arrived on the morning in question; the officers asked Musio whether he recognized his assailant and although defendant was present Musio was unable to identify him. At the police station Musio did not identify her husband until after the police had spoken to Musio, telling him to "be certain," and after Musio had been in the presence of Michael Wagers.



Wanita Wagers, the wife of Michael Wagers, testified for the defendant that she was present when Musio told the police that defendant had entered Musio's automobile after he had stopped at a traffic light and forced Musio to drive to his apartment where his stereo set was taken. Musio had also indicated during the ride to the police station that he was "not satisfied" with the outcome of the situation.

Betty Morris testified for defendant that she had met Musio, a stranger, while she had been walking on the streets with Debbie, and that she had agreed to engage in sexual intercourse with him at her apartment. After those three persons had arrived at Betty's apartment, defendant, Michael Wagers and Al Hunter entered; Hunter asked Musio for his wallet after Hunter determined that the witness had not yet been paid. Money was taken from Musio's wallet and the wallet was returned to Musio. Matters thereafter became "quiet, people were getting along"; there was a conversation concerning a party and Musio suggested that they use his stereo set. She had observed the stereo on the rear porch of the Elaine Place building after Musio, defendant, Wagers and Debbie had returned from Musio's apartment. She had not seen a knife in anyone's possession, nor was there violence or threats made that night; Musio had initially been frightened, but he calmed down thereafter; she had never before seen the knife in question.

Defendant testified in his own behalf that he had lived with his wife in apartment 304 of the Elaine Place building and that on the morning in question he entered Betty's second floor apartment in the company of Michael Wagers and Al Hunter; a party was in progress. Musio was present and told the witness not to hurt him. Hunter asked Musio for money, Musio removed his wallet, and Hunter took and returned the wallet. Defendant later commented that it was unfortunate that they had no radio for the party, and Musio replied that he owned a stereo set; defendant suggested that





Musio provide the stereo for the party. Musio drove defendant and the others to his apartment, where they secured the stereo, after which they returned to the Elaine Place building. The stereo equipment was placed on the rear porch of the building and while defendant had gone to his own apartment to see his wife, someone had removed the stereo set to another location in the building. Defendant also looked at Musio's wristwatch, which he returned immediately. Defendant had never before seen the knife in question; he also testified that he saw the knife in Betty's apartment prior to the night in question. He had previously known Betty, Debbie and Wagers, but he did not know Musio nor was he certain whether the others previously knew him.

In finding defendant guilty the trial court commented that the evidence was "bizarre in certain aspects of the case," that at times the conduct of the parties "seemed both reasonable and unreasonable," and that the court had heard stories containing inconsistencies from all parties concerned. The court stated that it was nevertheless "quite convinced" that the offenses were committed upon the complaining witness as charged.

Defendant contends that the trial court committed error in refusing to suppress the statement made to Officer Fornelli, that defendant had been involved in a robbery, for the reason that Officer Kurth was admittedly present at the taking of the statement but had not been called by the State as a witness thereto, as allegedly required by section 114-11 of the Code of Criminal Procedure. (Ill.Rev.Stat. 1971, ch.38, par.114-11.)

Subsection (d) of section 114-11 of the Code requires that all witnesses material to a confession be called by the State to establish that the confession was voluntary in discharge of its duty to proceed with the evidence at a hearing on a motion to suppress, or if such person is not called that his absence be satisfactorily accounted for. Ill.Rev.Stat. 1971, ch.38, par. 114-11(d). That requirement presupposes that an issue has been raised relative to the voluntary nature of the confession, since





the statute further provides as a prerequisite to a hearing on the voluntariness of the confession, that defendant first advance facts showing in what manner the confession is involuntary. See Ill.Rev.Stat. 1971, ch.38, par.114-11(a), (b), (c). Such requirement is also a prerequisite to a determination whether a person is or is not material to a confession.

The sole basis for defendant's motion below to suppress the statement was the fact that Officer Kurth was not called to testify; no ground was advanced why the statement was involuntary. The sole ground advanced on this appeal in support of defendant's position that the instant statement was involuntary is his theory that all police station interrogations are conducted in an atmosphere hostile to an accused. Without specifying in what manner or for what reason the instant statement was involuntary, the question of whether Officer Kurth was or was not a "material" witness to that statement within the meaning of the statute was not before the trial court and the circumstances did not require that he be called as a witness. See People v. Beksell (1970), 125 Ill.App.2d 322, 261 N.E.2d 40; People v. Richardson (1974, No. 58633), --Ill.App.3d--.

The cases cited by defendant in support of his position in this regard are not in point; the defendants there had alleged facts which placed the voluntariness of their respectively challenged confessions in issue, thereby creating a basis for a determination whether a person in attendance at the taking of the confession was or was not material thereto: see People v. Dale (1960), 20 Ill.2d 532, 171 N.E.2d 1; People v. Armstrong (1972), 51 Ill.2d 471, 282 N.E.2d 712; People v. Wright (1962), 24 Ill.2d 88, 180 N.E.2d 689.

Defendant next contends that the trial court improperly failed to suppress as evidence complainant's wristwatch taken from his apartment by Officer Fornelli, arguing that it was seized without a warrant and under circumstances which did not constitute a voluntary consent by his wife for the officer to search the apartment.



Officer Fornelli testified that some two hours after he had taken the foregoing statement from defendant in the presence of defendant's wife at the police station, he and Officer Kurth went to defendant's apartment in the Elaine Place building and knocked on the door; defendant's wife answered the knock. The officer inquired of Mrs. Taylor whether "there was a watch around the apartment with a leather band," and Mrs. Taylor responded by opening a drawer in the hallway "right near" the front door and saying, "This is the only watch I know of." The officer then picked the wristwatch from the drawer. The instant record discloses that Mrs. Taylor testified at trial subsequent to the foregoing testimony by Officer Fornelli and in no manner disputed or contradicted the circumstances testified to by him surrounding his confiscation of the wristwatch.

The facts further demonstrate that Mrs. Taylor knew who Officer Fornelli and his partner were and that she voluntarily consented to Officer Fornelli's seizure of the wristwatch; there is no evidence from which it could be concluded that she was in any manner coerced into providing the officers access to the wristwatch. Her actions comport with the conditions set forth in Schneckloth v. Bustamonte (1973), 412 U.S. 218, as to the type of circumstances necessary to constitute a "voluntary consent" to the officers' actions. See also Coolidge v. New Hampshire (1971), 403 U.S. 443. The question arises as to whether it would have been more prudent for the officer to have secured a search warrant prior to going to the apartment; Mrs. Taylor's actions and her voluntary consent to the confiscation of the wristwatch by the officers obviated that question, and the trial court properly held that that item was properly seized by the police.

Defendant further contends that the record does not demonstrate a knowing and understanding waiver of his right to a jury trial.



When the case was called for trial, preliminary matters were settled between the court, counsel and the parties; among those matters was defendant's open and voluntary waiver of his right to proceed before the grand jury on the assault charge; defendant's counsel represented to the court that he had advised defendant of his rights in that regard and defendant submitted the matter for trial before the court, "try it here." Michael Wagers, who had been tried with defendant for the offense of theft, was advised by the court of his right to a jury trial and waived that right. The following colloquy then transpired between the court, defendant and his counsel:

THE COURT: Mr. Taylor, you are charged with theft and aggravated assault. Each charge separately can result in a plea or finding, a sentence from one day to one year and/or a fine from One to a Thousand Dollars. Do you understand that, sir?

MR. TAYLOR: Yes.

THE COURT: Knowing that, do you want a jury trial or do you want me to hear the case?

MR. TAYLOR: You can hear the case.

THE COURT: You understand that once you waive a jury, it is waived and I proceed on the case, and jury is waived forever?

MR. TAYLOR: Yes.

THE COURT: Counsel, what is the plea?

MR. LASER: Judge, not guilty as to both charges.

No precise formula has been established to determine whether a jury waiver has been properly made; and admonition is generally sufficient if understood by an ordinary person in the position of the accused. People v. Richardson (1965), 32 Ill.2d 497, 207 N.E.2d 453; People v. Outten (1961), 22 Ill.2d 146, 174 N.E.2d 685.

It appears from the instant record that defendant was of normal intelligence and that at the time of the instant admonition he was present in court with his own counsel and counsel's law student assistant. There is no indication that defendant did not understand the plain import of the admonition. The point raised is without merit.



Defendant finally contends that the State failed to prove his guilt beyond a reasonable doubt, in light of the inconsistencies in the testimony of the witnesses and the somewhat bizarre factual situation.

The foregoing summary of the evidence demonstrates that sufficient evidence was adduced upon which the trial court, as the trier of fact, could have based a finding of guilt. Defendant had participated in taking Musio's wallet and his stereo equipment and further threatened Musio with a knife. The rather bizarre facts, that Musio had accompanied the robbers to his own apartment in his own automobile and that Musio had initially failed to implicate Wagers in the theft, must be considered in light of Musio's testimony that he was in fear for his own safety and that Wagers had promised to secure the return of his property. Those matters, as well as the other inconsistencies in the testimony of the witnesses, were for the trier of fact, who recognized those shortcomings in the evidence but who nevertheless commented that he was "quite convinced" of defendant's guilt; the evidence was not so improbable or inherently incredible as to admit of a reasonable doubt of defendant's guilt. People v. Novotny (1968), 41 Ill.2d 401, 244 N.E.2d 182.

For these reasons the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.







59352

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
 Plaintiff-Appellee, )  
 )  
 v. )  
 )  
 JOHN R. LEGG (Impleaded), )  
 )  
 Defendant-Appellant. )

APPEAL FROM  
 CIRCUIT COURT  
 COOK COUNTY

HONORABLE  
 EARL E. STRAYHORN,  
 Presiding.

Before McNAMARA, P.J., McGLOON, J., MEJDA, J.

PER CURIAM.

Defendant, John R. Legg, and Eddie Bostic, a codefendant, were charged with the offenses of attempted murder, in violation of section 8-4 of the Criminal Code; aggravated battery in that they inflicted bodily harm and used a deadly weapon, in violation of section 12-4 and section 12-4(b-1) of the Criminal Code; and attempted armed robbery, in violation of section 8-4 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, pars. 8-4, 12-4 and 12-4(b-1)). In a jury trial defendant was found guilty of attempted murder and aggravated battery and was sentenced to a term of not less than three nor more than nine years in the penitentiary. He was found not guilty of attempted armed robbery. Bostic was found not guilty of all the charges.

On appeal defendant contends that the trial court erred in refusing to give instructions on simple battery and unreasonable use of force; that defendant was not found guilty of attempted murder beyond a reasonable doubt; that he was prejudiced by the prosecutor's alleged improper and misleading comments on his silence at the time of his arrest and his failure to take the witness stand; that the prosecutor's closing argument was so prejudicial to defendant that he was deprived of an impartial consideration of his case by the jury; and that the judgment and conviction on the aggravated battery count should be vacated.



A hearing was had on defendant's motion to suppress the evidence and to quash the arrest, which was denied.

At the trial William Jamerson testified that on April 1, 1972, he was driving a cab equipped with a bullet-proof shield between the passenger and driver's sections. It was also equipped with an automatic rear door lock switch. At about 4:00 A.M., he was driving south on State Street when defendant and Bostic flagged him down and asked him to take them to 49 North Lotus, in Chicago. He agreed, provided he was given a \$5.00 deposit in advance. Defendant gave him a 10-dollar bill and, through a specially designed tray, he gave him \$5.00 change.

When they arrived at 49 North Lotus, Jamerson saw that the fare had exceeded \$5.00 and he turned around to discuss the fare. Defendant had a gun pointed at his head and told him to hand all the money back to Bostic. Jamerson told defendant it was a bullet-proof shield that separated them, but defendant said he had "steel jackets" in the gun. Jamerson locked the rear doors with the automatic switch and started driving wildly to Madison Street, trying to find a policeman. He proceeded to zig-zag on Madison Street at a high rate of speed until he saw a squad car at Pulaski Road. Meanwhile, defendant rolled down his window and fired at Jamerson through the driver's window, grazing his neck. The driver's window was closed and the shot caused the whole window to shatter and glass flew all across the front of the cab. Jamerson drove straight for the squad car, jumped out and told the policemen, "They tried to hold me up."

The policemen, with their guns drawn, directed Jamerson to unlock the rear door, then ordered defendant and Bostic out of the cab. Jamerson saw the officers search the cab and saw



them find a gun in the back. Jamerson was taken to the police station where he gave a statement to the police. His neck was bleeding and burning and he was taken to a hospital. He said he thought it was a glass cut, but the physician who examined him said it was a gunshot.

On cross-examination, Jamerson said he saw the gun pointed at him before defendant fired; that it was fired from an angle on Jamerson's left; and that only one shot was fired during the entire incident. He indicated the area of injury on his neck which was about two or three inches below his left ear. He said he did not carry a gun to protect himself while he was employed as a cab driver and that he never owned a gun. He said he had possessed a weapon before but did not own one. He also said that defendant gave him a 10-dollar bill and he gave defendant five singles.

N. R. Miller, a Chicago police officer, testified that on April 1, 1972, he and his partner, Officer Drodz, were in a marked police car when at about 4:55 A.M., near Madison and Pulaski, he observed a car about four or five blocks away, coming from the west, speeding and cutting across the center line. Drodz stopped the squad car and the other vehicle came toward them at about 50 miles an hour. It stopped about three or four feet from the squad car and the driver jumped out. Defendant and Bostic were in the back seat. As Jamerson got out he said, "They are trying to rob me. They have a gun." Miller noticed that Jamerson had his hand to his neck and a red substance was oozing through his fingers. He was taken to a hospital. Miller stated that defendant was seated directly behind Jamerson and Bostic on the other side. They were ordered from the cab after Jamerson released the lock, and were searched by Drodz and two other officers who had arrived at the scene.



Officer Miller searched the cab and recovered a .25 caliber automatic pistol on the floor in the rear, in front of where defendant had been sitting. The gun was blue steel with a black handle and was cocked for firing, with the handle back. Miller examined it and found one live round of ammunition in the chamber and five live rounds in the magazine. He removed the ammunition from the magazine. The bullets had metal heads, which is unusual. The metal head has better penetrating power than a lead head and will penetrate where a lead bullet will not.

Miller said the front window of the driver's side of the cab was completely shattered; glass was all over the front seat. He searched the front of the cab but could find no spent bullets. The shield was closed.

Robert Drodz, a Chicago police officer, testified that at approximately 4:55 A.M., on April 1, 1972, he was riding with his partner, Ned Rick Miller, in the vicinity of Madison Street and Pulaski Road. He substantially corroborated the testimony of Miller.

Eddie Bostic, testifying for the defense, said defendant gave Jamerson a 20-dollar bill for the \$5.00 deposit and did not receive any change. When they arrived at 49 North Lotus defendant and Jamerson began arguing about the money that had changed hands and were swearing at one another. Bostic suggested that defendant take the driver's number and go call the police. Defendant tried to open the door but it was locked. Defendant reached into his back pocket and took out two singles. He said to Jamerson, "I gave you a \$20 bill. All I have is two singles left in my pocket." He put the two bills back in his pocket, leaned back and looked out of the window. At that time Jamerson slammed the shield shut and





"pulled off." Bostic testified that defendant rolled down his window, took off his shoe and hit the driver's side window with the shoe, completely shattering it. Defendant was leaning out the window and he grabbed Jamerson when he was halfway out of the window. Bostic "guessed" that defendant was tugging at Jefferson with his hand and "trying to get a hold on his throat and pull him out of the cab or something." Bostic grabbed defendant's legs because he was afraid he might fall out, and defendant sat back in the cab.

Bostic said defendant leaned out of the window again when Jamerson fired a shot out the side window; that Jamerson opened the shield and tossed the gun in the back seat. It hit the side and bounced on the floor, landing at Bostic's foot. He told defendant that Jamerson had thrown the gun in back and defendant said, "Don't touch it, just leave it there." Bostic further testified that he had been drinking earlier that night and was "high." He said that neither he nor defendant attempted to rob or kill Jamerson. On cross-examination Bostic said he did not actually see the gun or who was holding it; that he did not remember whether Jamerson turned around when he fired the gun; that Jamerson fired the weapon because Bostic could see the "blaze" from it inside the cab; and that defendant got back in the cab after the shot was fired.

Thomas Swope, a Chicago police officer, testified that on April 1, 1972, at about 4:45 A.M., he was riding with his partner, John Randall, in a marked police car at the intersection of Karlov and Madison Streets when he saw a car pass on Madison at a high rate of speed. It crossed the median strip and began to weave. He and his partner made a U-turn and followed the car to Madison and Pulaski where they assisted in searching defendant and Bostic. Miller searched the cab in Swope's presence.



After the men were searched Swope and his partner took them into custody and transported them to the 11th District Police Station.

Defendant did not testify in his own behalf. It was stipulated that when he was searched he had three singles and seven cents in his possession.

At the close of all the evidence the State nolle prossed the count of the indictment charging the infliction of serious bodily harm on William Jamerson.

At the conference on jury instructions the trial court refused to give Defendants' Instructions Nos. 3 and 4. On appeal, the defendant argues that it was error for the trial court to refuse to give Defendants' Instruction No. 3 (IPI-Criminal No. 11.06) on the charge of simple battery.

It is well settled that a defendant is entitled to an instruction on the law applicable to a particular set of facts which the jury might find to have been proved by the evidence, even if there is only slight evidence pertaining thereto. (People v. Kucala (1972), 7 Ill.App. 3d 1029,1035, 288 N.E. 2d 622; People v. Keating (1971), 2 Ill.App. 3d 884,889, 270 N.E.2d 164.) However, an instruction on simple battery should not be given in the absence of evidence in the record to support that offense. People v. Montgomery (1974), 18 Ill.App. 3d 828,833, 310 N.E. 2d 760.

The record discloses that prior to the conference on instructions the State nolle prossed the count which alleged that each defendant committed the crime of aggravated battery by inflicting serious bodily harm on William Jamerson. That left for the jury's determination the count of attempted murder and



of committing a battery with a deadly weapon. Defendant did not testify, but the testimony of codefendant Bostic revealed that after exchanging heated words with Jamerson over change, Jamerson locked the doors and "pulled off." Bostic also testified that defendant rolled down the rear window and broke the front window with his shoe; that approximately half of his body was out of the window and he was tugging at Jamerson with his hands. Bostic said it was Jamerson who had the gun and fired a shot out the window, then tossed the gun in the back; that the gun bounced on the floor and landed at Bostic's feet. From this testimony it could be said there was evidence in the record that defendant committed only a simple battery against Jamerson.

It is also apparent from Bostic's testimony that it was the position of the defense that defendant did not have a gun and did not shoot. Rather, the evidence for the defense disclosed that defendant broke the front window of the cab with his shoe, and that the injury to Jamerson's neck was caused by flying glass and not by a bullet. From this evidence, defendant was entitled to an instruction on simple battery. It was reversible error for the trial court to refuse to give Defendants' Instruction No. 3.

Since we have concluded that the judgment should be reversed and the cause remanded for a new trial, we will also consider the trial court's refusal to give Defendants' Instruction No. 4. Defendant argues that it was error of the trial court to refuse to give Defendants' Instruction No. 4 (IPI-Criminal No. 24.08) on defense of property, which provided:

"A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to terminate another's wrongful interference with personal property lawfully in his possession."



In discussing this instruction the attorney for defendant said:

"Judge, I believe that a man is entitled to a defense, and in this case, the defense is his own property, justifiable use of force, if any force was used by him, to protect his property."

However, there is no evidence in the record that Jamerson attempted, by the use of force or otherwise, to interfere wrongfully with any personal property lawfully in the possession of defendant. On the contrary, all the evidence tends to prove that defendant was trying to force Jamerson to give him change from a 20-dollar bill which he had allegedly given to Jamerson. Therefore, defendant did not use force to prevent interference with personal property lawfully in his possession, but rather, he used force to attempt to secure personal property in the possession of Jamerson. Under such circumstances, it was not error for the trial court to refuse to give Defendants' Instruction No. 4. People v. Montgomery (1974), 18 Ill.App. 3d 828,833, 310 N.E. 2d 760.

In light of the foregoing, it is not necessary to discuss the other issues raised by defendant. The judgment of the trial court is reversed and the cause is remanded for a new trial.

Judgment reversed;  
remanded for new trial.







PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Respondent-Appellee,	)	
	)	Appeal from the Circuit
	)	
v.	)	Court of Cook County
	)	
	)	
LORENZO WAYNE WILLIAMS,	)	
	)	James Bailey, J.
Petitioner-Appellant.)	)	

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

The petitioner, Lorenzo Williams, appeals from an order dismissing his petition for post conviction relief without an evidentiary hearing. He contends that the failure of appointed counsel to amend his pro se petition denied him the effective assistance of counsel and he asks that the dismissal be reversed and the cause remanded for new proceedings.

In September 1971 Williams was confined to the Cook County Jail, awaiting trial on two counts each of attempted murder and aggravated battery. The charges arose from a March 1970 assault on his two young sons, Lorenzo, Jr., and Richard. On September 7, 1971, the Circuit Court Clerk's office received two documents prepared by Williams. One, styled "Petition \*\*\*\* Letter \*\*\*\* In re: Bail Bond Reduction," had been written on September 3rd. It alleged that his bond of \$25,000 was excessive and should be reduced. The other, prepared August 27th, was titled "Motion for Discharge for



Wont [sic] of Prosecution," and alleged that he had not been brought to trial within 120 days of the date he was taken into custody, in violation of the Illinois four-term statute, Ill.Rev.Stat., 1969, ch. 38, para. 103-5.

The documents were not brought to the attention of the court. On September 20th, Williams, represented by privately-retained counsel, entered negotiated pleas of guilty to all the offenses with which he was charged. His pleas were accepted and he received a single sentence of two to ten years in the penitentiary. Eight days later the petitions deposited in the clerk's office on September 7th were formally filed and called to the court's attention. The court elected to treat them jointly as a post-conviction petition, granted Williams leave to proceed in forma pauperis and appointed the Public Defender to represent him.

In April 1972 an assistant Public Defender filed a certificate pursuant to Supreme Court Rule 651(c). In it he represented under oath that, after consulting with Williams, examining the record of the "proceedings at trial," and studying the pro se documents, he felt that the latter adequately set forth all possible claims under the Post Conviction Hearing Act, and therefore he deemed it unnecessary to amend the petition. Shortly thereafter the State's Attorney filed a motion to dismiss the petition for failure to raise a constitutional issue properly determinable under the Act.



At the hearing on the motion to dismiss, Williams' appointed counsel advised the court that the so-called post conviction petition had been submitted by the petitioner prior to his guilty plea of September 20th. He conceded that the bail issue raised in the first document had become moot by Williams' conviction. Concerning the second petition, he stated that it was without merit since his investigation had revealed "there was no time during which one hundred days ran when the defendant himself did not request a continuance." At the close of the hearing the State's motion to dismiss was granted.

The documents sent to the clerk's office by Williams should not have been treated as a petition for post conviction relief. However, since the court elected to proceed as if they were, it was incumbent upon appointed counsel to comply with his duties under the Post Conviction Hearing Act (Ill.Rev.Stat., 1971, ch. 38, para. 122-1, et seq.), and Rule 651, Ill.Rev.Stat., 1971, ch. 110A, para. 651. The purpose of Rule 651 is to insure that indigent petitioners are provided proper representation when presenting claims under the Act. People v. Brown (1972), 52 Ill.2d 227, 287 N.E.2d 663; People v. Garrison (1969), 43 Ill.2d 121, 251 N.E.2d 200. Under the rule, counsel's minimum duties to the prisoner include consultation, examination of the trial record, ascertainment of the basis of the alleged grievances, and amendment of the pro se petition to adequately present the prisoner's constitutional contentions. People v. Slaughter (1968), 39 Ill.2d 278, 235 N.E.2d 566. Dismissal of a



post conviction petition on the pleadings despite a failure by counsel to comply with the rule has been held reversible error, even if the pro se petition itself failed to present a substantial constitutional claim. But this strict rule has so far been applied only in cases where the alleged omission involved failure to consult with the petitioner or to examine the record of trial. See People v. Wales (1970), 46 Ill.2d 79, 262 N.E.2d 926.

Williams bases his claim that he was inadequately represented on two omissions of his counsel: failure to redraft the petition in compliance with the statutory format and failure to present all possible claims cognizable under the Act.

The State concedes that counsel was remiss in his failure to amend the pro se petition to state the date of judgment and the sentence in the original proceeding. The Act requires that:

"The petition shall identify the proceeding in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and clearly set forth the respects in which the petitioner's constitutional rights were violated." Ill.Rev.Stat., 1969, ch. 38, para. 122-2.

However, an appeal from the denial of a post conviction petition is limited to those errors which involve substantial constitutional rights. People v. Powell (1970), 46 Ill.2d 410, 263 N.E.2d 33. Williams' crimes and the sentence given him were made known to the court and made part of the record. The pro se documents themselves carried the indictment number. There has been no suggestion of confusion as to the identity of the proceeding under attack, nor is there doubt that the petition was filed within the limitations period; and there is no contention that Williams' counsel did not





consult with him. There being no indication of prejudice we conclude that counsel's failure to revise the pro se petition to state the date of judgment and the sentence, while reflecting laxity on his part, was more technical than substantial and by itself did not render his representation of Williams inadequate.

The second alleged omission, counsel's failure to raise all possible claims within the contemplation of the Act is more serious. However, the existence of only one claim has been suggested: that the trial court erred by entering judgment upon more than one offense arising out of the same conduct. The State responds that this was not error, since only a single sentence was imposed, and that even if it was error it did not raise a constitutional claim, so Williams' counsel cannot be blamed for omitting the matter from an amended post conviction petition.

Although the defendant pleaded guilty to all four counts, the two counts of aggravated battery were lesser offenses arising from the same transactions as the two counts of attempted murder. Since a single criminal act will support but one conviction, it was a mistake for the trial court to enter judgment on the pleas of guilty to the two lesser offenses. The error was not remedied by the court's imposition of but one sentence. People v. Lilly (1974), 56 Ill.2d 493, 390 N.E.2d 1. Moreover, the error was of constitutional magnitude and noticeable as plain error in this appeal.



People v. Cox (1972), 53 Ill.2d 101, 291 N.E.2d 1. Since this is the only issue raised we may, in the interest of an orderly administration of justice, dispose of the issue rather than put the defendant and the State to the inconvenience and delay of using a different remedy. Ill.Rev.Stat., 1973, ch. 110A, para. 615(a); People v. Cox; People v. Scott (1969), 43 Ill.2d 135, 251 N.E.2d 190. Accordingly, we will vacate the judgment of conviction as to the counts of the indictment which charged the lesser offenses of aggravated battery.

Our resolution of Williams' only asserted basis for post conviction relief makes moot the claim that he was denied the effective assistance of counsel in the presentation of his petition to the court. The order dismissing the petition is affirmed and the judgments on the petitioner's plea of guilty to the two counts of aggravated battery under indictment number 70-1277 are vacated.

Affirmed, as modified.

McNamara, P.J., and McGloon, J., concur.



59907

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
	)	Appeal from the Circuit
v.	)	Court of Cook County.
	)	
ANTHONY L. WEEKS,	)	
	)	Honorable Earl E. Strayhorn,
Defendant-Appellant.	)	Presiding.

BEFORE McNAMARA, P.J.; DEMPSEY AND MEJDA, JJ.

PER CURIAM:

Anthony L. Weeks (defendant) entered a plea of guilty on April 19, 1972, to the offense of attempt burglary, in violation of Section 8-4 of the Criminal Code, and was admitted to probation for a period of five years on condition that he serve five months in the county jail, time considered served. Ill.Rev. Stat., 1969, ch. 38, par. 8-4. A rule to show cause why defendant's probation should not be revoked was entered on April 13, 1973; probation was terminated after a hearing on the rule, and defendant was sentenced to a term of five year to ten years. On this appeal he contends that he was not served with proper notice of the grounds for the revocation of probation and that the sentence imposed was improper in light of the Unified Code of Corrections.

At the plea of guilty to the attempt burglary and prior to having been placed on probation, the trial court admonished defendant concerning the conditions of probation, two of which were his periodic reporting to his probation officer and his abstinence from the use or possession of narcotics. On February 2,



1972, the probation department filed an application for a warrant for defendant's arrest for the violation of the terms of his probation in that he had failed to report to his probation officer and had otherwise failed to cooperate with the probation authorities. The warrant was served upon defendant while he was in court on March 6, 1973, to answer to a charge of the possession of narcotics. The rule to show cause why defendant's probation should not be terminated was entered on April 13, 1973, and the hearing on the rule was held on that same day. Attached to the rule to show cause was an information by the probation department reciting defendant's failure to report and his failure to cooperate; reciting the issuance of the warrant and its service upon defendant while in court on the narcotics-related charge, and reciting also that the officers who effected the service of the warrant would testify at the hearing on the rule to show cause. Defendant's counsel was served with a copy of the rule and the attendant information prior to the hearing and he indicated that he was ready to proceed.

A probation officer testified at the hearing relative to the allegation that defendant had failed to report to the probation authorities; his testimony consisted of a verbatim recitation from the information sheet accompanying the rule to show cause which that witness admitted he did not compile; he also testified that he had no knowledge of the facts of the case other than what appeared on that sheet. An objection to the witness' testimony on the grounds of hearsay was overruled.

A Chicago police officer testified at the hearing that





he and his partner had arrested the defendant and defendant's companion on March 5, 1973, as the two men were walking on the street and the officers observed defendant drop a tinfoil packet to the ground. Analysis of the packet revealed its contents to be heroin. The officer was unaware of the probation violation warrant which was then outstanding for defendant's arrest.

Defendant testified that he knew nothing of the packet in question; he testified that his companion admitted to the police that the packet had belonged to him; defendant did not know his companion was in possession of the packet nor did he see him drop it to the ground on that date. Defendant admitted having used narcotics while on probation, but denied possession of narcotics on the date of his arrest, and he further admitted having failed to report to the probation authorities during the term of probation, although he stated that he telephoned and wrote to his probation officer.

Defendant told the trial court that he did not intend to violate the terms of probation by failing to report, to which the court replied that it was "not so much concerned" with the defendant's failure to report as it was with his possession and use of the narcotics. Probation was thereupon terminated.

Defendant argues that he did not receive proper notice of the grounds for the revocation of his probation since the application for the warrant named as grounds his alleged failure to report and to cooperate, whereas the record discloses that



his probation was revoked because of the narcotics-related matter.

While it is true that the application of the probation department for the warrant named as grounds therefor solely defendant's failure to report and to cooperate, the rule to show cause which was issued two months later also named the narcotics-related matter which had intervened. The record discloses that defense counsel received a copy of the rule to show cause disclosing the narcotics-related matter. There is no merit to this contention.

Defendant further argues that his sentence must be reduced pursuant to the Unified Code of Corrections for two reasons. First, attempt burglary is punishable only as a Class 4 felony, under the authority of People v. Scott (1973), 14 Ill.App.3d 211, 302 N.E.2d 146, for which a term of one year to three years must be imposed. Second, defendant must be accorded a credit against the sentence imposed due to the time which he had theretofore spent on probation, pursuant to Ill.Rev.Stat., 1972 Supp., ch. 38, par. 1005-6-4(h).

Contrary to defendant's contention that an attempt burglary is punishable as a Class 4 felony, this division of the Appellate Court disagreed with the Scott decision. People v. Ashford (1974), 17 Ill.App.3d 592, 308 N.E.2d 271. Later, the Supreme Court reversed Scott and held that attempt deviate sexual assault was punishable as a Class 3 felony. People v. Scott (1974), 57 Ill.2d 353, 312 N.E.2d 596. The court's ruling in that regard applies equally to an attempt burglary.



As a Class 3 felony, attempt burglary is punishable by a term of not less than one year nor more than ten years, with the minimum term to be imposed not to exceed one-third of the maximum sentence. (Ill.Rev.Stat., 1973, ch. 38, par. 1005-8-1). The sentence imposed upon defendant of five years to ten years falls within those limits, but the imposition of the maximum term of ten years requires that the minimum term be reduced to not less than three years four months in conformance with the one-to-three ratio required by the Code. This case has not reached final adjudication, the sentencing provisions of the Code are beneficial to defendant, and the Code therefore applies. People v. Harvey (1973), 53 Ill.2d 585, 294 N.E.2d 269; Ill.Rev.Stat., 1973, ch. 38, par. 1008-2-4.

With regard to the question of whether defendant is entitled to a credit against his sentence for the time served on probation, the Code provides that such credit shall be applied against a sentence of imprisonment or periodic imprisonment. Since the defendant's probation was revoked and the sentence imposed during the time when the original statute allowing such credit was in effect, vis-a-vis the amendment thereto enacted by Public Act 78-939 enabling discretionary action by the court in that regard, the trial court must grant the credit in question without regard to its discretion in the matter. Compare: Ill.Rev.Stat., 1972 Supp., ch. 38, par. 1005-6-4(h) and Ill.Rev.Stat., 1973, ch. 38, par. 1005-6-4(h); see also People v. Robinson (1974), 20 Ill.App.3d 152, 313 N.E.2d 213, Lv. to App. denied 9/27/74. The cause must be remanded to the trial court for determination of the amount of



time to which defendant is entitled and for the trial court to issue an amended mittimus accordingly since the Code does not provide a procedure whereby the court clerk can simply transmit such information to the appropriate agency for such determination.

People v. Schreiber (1973), 18 Ill.App.3d 410, 304 N.E.2d 686; People v. Ford (1974), 20 Ill.App.3d 890, 314 N.E.2d 547; People v. Kelly (1973), 16 Ill.App.3d 559, 306 N.E.2d 638.

For these reasons the defendant's sentence is modified to a term of not less than three years four months nor more than ten years, and as modified the judgment is affirmed; the cause is remanded to the trial court with directions to compute and allow as a credit against the sentence the time defendant has served on probation and to amend the mittimus accordingly.

Judgment affirmed as  
modified, and cause remanded  
with directions.





IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

FILED  
NOV 4 - 1974

Walter T. Simpson  
FIFTH DISTRICT OF ILLINOIS  
CLERK APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,	)	
rel. JAMES ALLEN BUCKHOLZ,	)	Appeal from the Circuit Court of
	)	Madison County.
Petitioner-Appellant,	)	
	)	
	)	
	)	
MUL W. SYMPSON, Warden,	)	Honorable John Gitchoff,
	)	Judge Presiding.
Respondent-Appellee.	)	

PER CURIAM:

Petitioner James Allen Buckholz was convicted of murder upon his plea of guilty in Madison County in 1961 and was sentenced to life imprisonment. Petitioner filed a petition for a writ of habeas corpus in Madison County in 1973 alleging only that his further incarceration is illegal because of the change in penalty for murder. (Ill.Rev.Stat. chapter 38, section 9-1, as effective January 1, 1962). The petition was denied.

Appointed counsel on appeal, the Office of the State Appellate Defender, Fifth Judicial District, has filed a motion for leave to withdraw as counsel and dismiss the appeal and has filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1669, 18 L.Ed.2d 493. Petitioner has been given proper notice of the motion and has been granted an extension of time in which to file documents supporting his appeal. No response has been received.

Petitioner has made no allegation that the circuit court of Madison County lacked jurisdiction to enter the judgment challenged. Habeas corpus relief does not lie where the court entering the judgment challenged had proper jurisdiction and the sentence imposed has not expired (Ill.Rev.Stat. chapter 65, section 21).

We have reviewed the record and find no errors in the habeas corpus proceedings which would require reversal.

Motion to withdraw allowed; judgment affirmed.

Justice Carter not participating.



No. 73-379

FILED  
NOV 8 - 1974

IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

*W. H. T. Linn*  
FIFTH DISTRICT OF ILLINOIS  
CLERK APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of
	)	Massac County.
vs.	)	
	)	
MICHAEL SCOTT,	)	Honorable Robert H. Chase,
	)	Judge Presiding.
Defendant-Appellant.	)	

PER CURIAM:

Defendant Michael Scott was convicted of criminal trespass to a vehicle and unlawful use of weapons upon his guilty plea in Massac County and was sentenced to two concurrent terms of from one to three years.

The State Appellate Defender, appointed as counsel on appeal, has filed a motion and memorandum pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1369, 18 L.Ed.2d 493, alleging that there is no merit to the appeal and requesting leave to withdraw. Defendant has been given proper notice of the motion and granted an extension of time in which to file documents supporting his appeal. He has failed to respond.

We have examined the record and find no error in the indictments or plea proceedings and note that the sentence was properly within the limits set forth in Ill.Rev.Stat., chapter 38, section 1001-1-1 et seq.

Motion to withdraw allowed; judgment affirmed.

Justice Carter, not participating.

Publish Abstract Only.



3D  
23 I.A. 1087

73-84

UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss.  
Second District )

At a session of the Appellate Court, begun and held  
at Elgin, on the 3rd day of December, in the year of our  
Lord one thousand nine hundred and seventy-three, within and  
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice  
Honorable GLENN K. SEIDENFELD, Justice  
Honorable WILLIAM L. GUILD, Justice  
LOREN J. STROTZ , Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On  
November 27, 1974 the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:



IN THE

ISREH I. STOLTZ, Clerk, 100 10th  
 100 10th, 2nd District

Defendant-Appellee.

In 1962 the Gas Company entered into a contract with the Contracting Company for the installation of a 24 inch gas main. A portion of this installation involved the crossing of Salt Creek. Defendant Contracting Company was required to open a trench across



the river and place the gas main in the river bed of Salt Creek at 640' above sea level. After the main was placed in the river bed, it was weighted down with river weights prescribed by the Gas Company. The river crossing installation was begun in October, 1962 and completed in November, 1962. The Contracting Company was thereupon paid in full by the Gas Company for this work.

In 1965 Madden was engaged by the State of Illinois to construct a bridge across Salt Creek. Madden, while performing its work, punctured this gas main in November, 1965. The Gas Company then hired the Contracting Company to repair the damage to its main and the Contracting Company did, in fact, repair this damage. The Gas Company paid the Contracting Company for these repairs.

In October, 1970 the Gas Company filed suit against Madden for the negligent striking of the gas main and also against the Contracting Company for negligently installing the main at a depth other than that prescribed by the plaintiff. In December, 1970 the Gas Company had a survey made of the gas main under Salt Creek and found the elevation of the main to vary from a depth of 640.98' to 641.26' above sea level.

After completion of discovery, Contracting Company filed the motion for summary judgment which was chiefly supported by the affidavit of Harry Stearney, the supervisor in charge of installation for Contracting Company. In response, the Gas Company filed four counter-affidavits. The trial court then granted the defendant's motion for summary judgment and made an express written finding that there was no just reason for delaying enforcement or appeal.

Section 57 of the Civil Practice Act (Ill.Rev.Stat. 1971, ch. 110, par. 57) provides that a summary judgment should be rendered if the pleadings, depositions and admissions on file, together with any affidavits, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."



The proper province of the court in a summary judgment proceeding is to determine whether a genuine issue of fact exists. If the court determines that there is such an issue of fact, the motion should be denied. In a summary judgment proceeding it is not the duty of the court to decide any disputed issue of fact. (Oglesbee v. Nathan (1973) 14 Ill.App.3d 609, 302 N.E.2d 483.) A summary judgment proceeding is not a battle of affidavits in which the trial court must decide the issues based on the affidavits. Rather, the trial court may use these affidavits only in determining whether or not an issue of fact exists. In Ruby v. Wayman (1968), 99 Ill.App.2d 146, 150, 240 N.E.2d 699, 701, this court stated:

"In making the above determination on a motion for summary judgment, the court must construe the pleadings, depositions and affidavits most strictly against the moving party and most liberally in favor of the opponent."

Considering these principles, we find that the trial court should have denied the Contracting Company's motion for summary judgment. As stated by the Contracting Company, "the sole issue involved in this case is whether the defendant, Contracting & Material Company, negligently installed a gas main at a depth other than specified in the plans." Contracting Company brought out in its affidavit by its supervisor, Stearney, that it had installed the main at the depth called for in the plans and specifications. Although the Gas Company produced no direct evidence showing the depth of the main at the time it was installed, it did show that eight years later the main was not at its proper depth. This showing by the Gas Company is enough to raise a genuine issue/<sup>as to a</sup> material fact -- at what depth the gas main was installed.

Although Contracting Company asserts that this main might have moved one foot in eight years, we believe it is beyond the power of the trial court to infer this from the facts which were before it at the summary judgment proceeding. None of the affidavits shed any light on this question. Thus, whether or not a gas main of this size and located under Salt Creek can move one foot in eight

years is certainly a question of fact which can only be decided after there has been a trial on the merits.

Additionally, the affidavits filed herein show a direct conflict between the Contracting Company and the Gas Company as to whether Gas Company's personnel surveyed the area before installation of the main and directed Contracting Company in the installation. The Contracting Company insists that the installation was at the depth as surveyed by the Gas Company's surveyors. The Gas Company contends that at no time did they make a survey for this purpose, that this, in fact, was a part of the duty of the Contracting Company viz., to determine the 640' elevation pursuant to the plans and specifications. Thus, this conflict produces another genuine issue as to a material fact which cannot be resolved by the trial court at a summary judgment proceeding.

For the foregoing reasons the summary judgment entered in favor of Contracting & Material Company and against Northern Illinois Gas Company is reversed and the cause is remanded to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

MCRAN, T.J. P.J. and SEIDENFELD, J. CONCUR.

73-168

UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss.  
Second District )

At a session of the Appellate Court, begun and held at Elgin, on the 3rd day of December, in the year of our Lord one thousand nine hundred and seventy-three, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice  
Honorable WILLIAM L. GUILD, Justice  
Honorable L.L. RECHENMACHER, Justice  
LOREN J. STROTZ , Clerk Pro Tem  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On November 27, 1974 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



Abstract  
FILED

NOV 27 1971

LOREN J. STOLTZ, Clerk pro tem  
Appellate Court, 2nd District

IN THE  
APPELLATE COURT OF THE STATE OF ILLINOIS  
SECOND JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court for the 16th
v.	)	Judicial Circuit, Kane
	)	County, Illinois.
CHARLES PASSLEY,	)	
	)	
Defendant-Appellant.	)	

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

Defendant was found guilty of armed robbery, a class 1 felony, after a bench trial, and was sentenced to a term of 7 to 10 years in the penitentiary. He contends on appeal, as his co-defendant, O.Z. Harston, did in People v. Harston ( ), \_\_\_ Ill.App.3d \_\_\_, No. 72-328, that (1) because his minimum sentence exceeds one-third of the maximum sentence imposed, it is not "an indeterminate sentence" as required by Sec. 5-8-1(a) of the Unified Code of Corrections (Ill.Rev.Stat. 1973, ch. 38, sec. 1005-8-1(a)) and (2) it ignores the mandate of Sec. 11 of Article 1 of the Illinois Constitution of 1970 requiring penalties to be "determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship". Reliance was placed by that defendant, as it is in the instant case, on the American Bar Association's Minimum Standards (for criminal justice) which require that the minimum sentence shall not exceed one-third of the maximum sentence actually imposed.

In affirming the judgment of the trial court in Harston where the defendant, after a jury trial, was sentenced



to 12 to 15 years we held that, except as to class 2 and class 3 felonies where the legislature expressly set forth the "one-third rule", the A.B.A. Standards are merely "suggestions" and not the law for class 1 felonies. We adhere to that holding in the instant case.

Moreover the trial court took cognizance of the seriousness of the offense, the defendant's extensive juvenile record, including confinement at St. Charles School for Boys, the robbery charge shortly after his release from that institution which was reduced to a misdemeanor and resulted in a sentence of 1 year at the Illinois State Farm at Vandalia. As we observed in Harston, "[t]he three year variance between the minimum and maximum sentence reflects the trial court's assessment of defendant's potential for rehabilitation" in this case. We hold that such assessment was reasonable and that the sentence is indeterminate and therefore should be affirmed.

Judgment affirmed.

GUILD and SEIDENFELD, JJ., concur.







73-250

## UNITED STATES OF AMERICA

State of Illinois     )  
Appellate Court     )   ss.  
Second District     )

At a session of the Appellate Court, begun and held  
at Elgin, on the 3rd day of December, in the year of our  
Lord one thousand nine hundred and seventy-three, within and  
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice  
          Honorable GLENN K. SEIDENFELD, Justice  
          Honorable WILLIAM L. GUILD, Justice  
                  LOREN J. STROTZ     , Clerk  
                  JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit:   On

November 27, 1974   the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:



# 73-250

FILED

IN THE

NOV 27 1974

APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

LUREN J. STROTE, Clerk pro tem  
Appellate Court, 2nd District

---

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the 18th
	)	Judicial Circuit
v.	)	
	)	DuPage County, Illinois
WALTER J. BORAK,	)	
	)	
Defendant-Appellant.	)	

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MR. JUSTICE GUILD delivered the opinion of the court:

Dr. Walter J. Borak was found guilty in a jury trial of contributing to the sexual delinquency of a child (Ill.Rev.Stat. 1969, ch. 38, sec. 11-5(a)(3)). He was sentenced to a term of one year, to be served consecutively with a prior conviction of 5-8 years for rape and deviate sexual assault, (see People v. Borak (1973), 13 Ill.App.3d 815, 301 N.E.2d 1), and a \$1000 fine. The defendant contends herein that he was denied a fair trial because no court reporter was present at the Grand Jury proceedings, and that the State failed to prove him guilty beyond a reasonable doubt.

The defendant's first contention -- that he was denied a fair trial because no court reporter was present to transcribe the Grand Jury proceedings thereby impeding cross-examination of the prosecutrix at trial -- is based upon "the tenure and spirit of Supreme Court Rule 412(a)(ii)" (Ill.Rev.Stat. 1971, ch 110A, sec. 412(a)(ii)). We need not quote from that rule nor detail defendant's argument on this issue since the Illinois Supreme Court, in People v. Lentz (1973), 55 Ill.2d 517, 304 N.E.2d 278, has determined this point. In Lentz, the court held that the State need not provide a court reporter at Grand Jury proceedings. It therefore follows that defendant was not denied a fair trial due to the absence of

a court reporter at the Grand Jury proceedings.

Resolution of defendant's second contention -- that the State failed to prove him guilty beyond a reasonable doubt -- requires a statement of the proofs adduced at trial. The prosecutrix testified that on June 11, 1970, she was suffering from a "bad sore throat." On advice of her mother she made an appointment to see the defendant for treatment of the sore throat. She had seen the defendant three or four times in 1969 for a sore throat and on each of those visits she had been accompanied to the defendant's office by her mother. During those visits she had never removed any of her clothes.

On June 11, 1970, her boyfriend drove her to the defendant's office. After sitting down in the examination room, the prosecutrix informed the defendant in response to questions that she was 17 years of age and working as a lifeguard for the summer. The defendant examined her throat, ears, nose and eyes and then told her to remove her dress and bra because he wanted to check her heart. With the defendant's assistance, she removed her dress and bra. Defendant began checking around her breasts with a stethoscope, and then dropped the stethoscope and began manipulating her breasts with his hands. She testified that he was squeezing her breasts with his fingers extended "like holding a ball." She never told him of any injury concerning her breasts. He then told her to get dressed, which she did and he later asked her when her period was due. She said that she didn't know. She testified that defendant said he was afraid that with the combination of her period and sore throat and being in the water, she was going to get very sick. He told her to lay down on the table so he could check to see when her period was due. She lay down on the table and he lifted her dress, pulled her underwear down a few inches and pressed around on her stomach. He then stated that her period was due soon.

The prosecutrix further testified that after sitting back up the defendant kissed her on her lips. She immediately pulled

her head and shoulders back. Defendant then told the prosecutrix to go to the treatment room so he could use a machine on her to clear up her sinuses. They went to the treatment room and she lay down on a bed and he placed a disc over her mouth and nose. The defendant then left the room and returned in about ten minutes and removed the machine from her. He then sat down beside her and asked if she was interested in taking birth control pills. She had not requested any medication with reference to any type of birth control device. He told her he did not want her to get pregnant. He said that she had a good tan and that he liked her shoes and that she was attractive. He then kissed her on the lips again, and she again moved her head and shoulders back. He then stood up and told her he had some medication for her. He told her he wanted her to return in two days, before hours, at 7:30 a.m. so that he could put her under the machine to clear up her sinuses. He said he wanted to get her out before his patients started coming in.

She further testified that she was nervous, shocked and totally surprised when the defendant left the room. She picked up some pills at the receptionist's window and the receptionist wrote down the appointment. On the way home, she told her boyfriend that the defendant had asked her if she wanted to take birth control pills. Her boyfriend asked her what else happened but she did not say anything further.

The prosecutrix further testified that after arriving home she felt very upset and embarrassed. After having dinner with her family, she went to her girlfriend's house and told her friend what had happened at the defendant's office. The elapsed time between the alleged offense at the defendant's office and the time at which the prosecutrix first complained about the defendant's conduct to her girlfriend was approximately one hour. The prosecutrix then related the incident to her girlfriend's mother and was advised to tell her parents. She then told her mother what had



happened at the defendant's office, her mother told her father, and the next day the incident was reported to the State's Attorney's office.

The testimony of the defendant, Dr. Borak, was basically in complete contradiction of the salient points of the testimony of the prosecutrix. The defendant testified that he did not request the removal of the prosecutrix' bra because it was not necessary and that he conducted the examination while her dress was lowered but while her bra was in place. He further denied that he suggested that she take birth control pills or that he manipulated her breasts but he stated that the only thing necessary for the examination was the placing of the stethoscope. The defendant further denied that he ever asked the prosecutrix to lay down on the examination table so he could check her abdomen. He denied kissing the prosecutrix at any time during the examination, and stated that he told his receptionist that she was to get an antibiotic and a cold pill. He testified that he told the prosecutrix to return to the office at 8:30 a.m. at the beginning of office hours. On cross-examination, the defendant testified that the only receptionist on duty at the time of the examination of the prosecutrix was his wife, Mrs. Borak. Two State's witnesses were called in rebuttal to show that the receptionist on duty was not the defendant's wife but was a 19 year old blond girl whom the prosecutrix' boyfriend knew was not Mrs. Borak.

Several witnesses testified to circumstances which occurred immediately after the offense in question which tended to corroborate the testimony of the prosecutrix.

The boyfriend of the prosecutrix testified that on the trip to the defendant's office the prosecutrix was "pretty cheerful" but that on the return trip she was "up-tight, upset...nervous, quiet." He also corroborated the testimony of the prosecutrix as to the alleged conversation about birth control pills.

Catherine Johnson, mother of the prosecutrix' girlfriend,

testified that she saw the prosecutrix at about 5:30 p.m. on June 11, 1970 and that she appeared upset. She further testified that she had a conversation with the prosecutrix and after listening to her for 15-20 minutes, suggested that she go home and talk to her parents.

The mother of the prosecutrix stated that when her daughter went to the defendant's office, she was perfectly normal and cheerful, but that later, after she returned and during dinner, she was very shaky, quiet and hardly ate anything. She further testified that her daughter then went to a girlfriend's house and came home about 40 minutes later, appeared extremely nervous and then told her what had happened in the defendant's office.

The jury was informed by People's Exhibit #3 that defendant had been convicted of rape and deviate sexual assault. Certain very minor inconsistencies in the prosecutrix' testimony were brought out on cross-examination and were explained by the prosecutrix.

The defendant's position on appeal is that the testimony of the prosecutrix in this case was uncorroborated and neither clear nor sufficiently convincing to support the conviction. We disagree. The testimony of the prosecutrix was in important respects corroborated and she reported the events at defendant's office within one hour to her girlfriend and shortly thereafter to her girlfriend's mother and then to her own mother. The cases cited by the defendant involving three and four day delays in the reporting of the alleged offense and substantially uncorroborated testimony of the complaining witness are thus inapposite to the instant case. Furthermore, the jury could consider the prior conviction of the defendant as bearing upon his credibility, and could draw the inference as to the defendant's purpose in stating that his wife was present at the time of the alleged offense.

We are not unmindful of the problems of proof which exist in the prosecution and defense of sex crimes cases. In order to protect the interests of an accused in prosecutions for rape, or for

contributing to the sexual delinquency of a child in which the same evidentiary standards apply, the rule in Illinois is that a conviction in such cases will not be sustained unless the testimony of the complaining witness is either clear and convincing or substantially corroborated by some other facts, evidence or circumstances. (People v. Stagg (1963), 29 Ill.2d 415, 194 N.E.2d 342; People v. Sims (1972), 5 Ill.App.3d 427, 283 N.E.2d 906.) In the instant case, the testimony of the complaining witness was clear, convincing and corroborated by other testimony. The defendant's contention that the prosecutrix delayed in reporting the incident, that the testimony was uncorroborated and that it was not clear and convincing is not borne out by the record herein. In addition, a reviewing court will not set aside a jury's verdict of guilty unless the evidence is so palpably contrary to the verdict or so unreasonable, improbable or unsatisfactory as to cause a reasonable doubt as to the guilt of the accused. (People v. Sumner (1969), 43 Ill.2d 228, 252 N.E.2d 534.) In our view, the evidence in this case is not of such quality as to cause a reasonable doubt of the guilt of the accused. Accordingly, we find defendant's contention that the evidence failed to prove his guilt beyond a reasonable doubt to be without merit. Therefore, the conviction herein is affirmed.

AFFIRMED.

- 1 Defendant was convicted of both rape and deviate sexual assault and sentenced to serve 5-8 years for each offense, the sentences to run concurrently. On appeal, the conviction for deviate sexual assault was affirmed and the conviction for rape was reversed.

MORAN, T.J. P.J. and SEIDENFELD, J. CONCUR.















